

MISSISSIPPI LAW JOURNAL



SHUT-IN GAS WELL PROBLEMS

Leslie Moses

MISSISSIPPI'S SIXTEENTH SECTION SCHOOL LANDS

Semmes Luckett

STATE SOVEREIGNTY AND THE RATIFICATION OF
THE CONSTITUTION—III

William P. Murphy

STATE SOVEREIGNTY AND THE CONSTITUTION—
A SUMMARY VIEW

William P. Murphy

May 1962

VOLUME XXXIII

NUMBER 3

THE J. E. NEILSON CO.

DEPARTMENT STORE

OXFORD, MISS.

The Best Place to Shop for More
Than 100 Years

New Reprints Available

The *Mississippi Law Journal* recently has had reprinted nineteen single issues of volumes 3-8, most of which have been out of print for a number of years. These reprint issues are priced at \$1.50 each, the regular back issue rate.

For these valuable additions to your library, write:

MISSISSIPPI LAW JOURNAL

P. O. Box 146

University, Mississippi

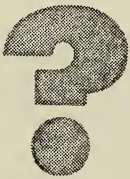
DETAILED PRICE LIST ON REQUEST

MORE FOR YOUR MONEY

with Insured Safety

are you
responsible
for these:

- PENSION FUNDS
- LEGAL TRUST FUNDS
- CORPORATE ACCOUNTS
- PERPETUAL CARE FUNDS
- INDIVIDUAL ACCOUNTS



*Accounts
easily
opened and
handled
by mail*

4½%

*Current
Dividend*

Many lawyers in charge of money for others find that First Federal of Jackson is one of the best places for trust funds. Accounts are insured up to \$10,000 by the Federal Savings and Loan Insurance Corporation. In addition, they are guarded by the sound management which has made this institution grow into one of the largest Savings and Loan Associations in the South. All funds are available upon demand.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION

MAIN OFFICE: 204 SO. STATE ST.

WESTLAND BRANCH
at ROBINSON ROAD

MEADOWBROOK BRANCH
at NO. STATE STREET

JACKSON, MISSISSIPPI

Please mention the *Mississippi Law Journal* when dealing with our Advertisers

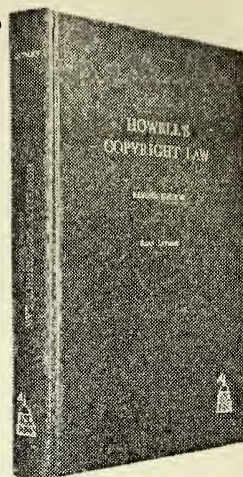
Now available!

HOWELL'S COPYRIGHT LAW

Revised (Fourth) Edition

By ALAN LATMAN

Price \$9.25



This completely revised, up to date edition of what has been for more than twenty years the standard reference manual on copyright law and practice has just come off the press. Lawyers, authors, composers, performers, publishers, motion picture producers, and everyone else concerned with problems of copyright will find this volume an invaluable tool.

Mr. Alan Latman is thoroughly versed in the intricacies and problems of copyright. A former Special Consultant to the Register of Copyrights on the General Revision of the Copyright Law and the author of three notable studies of copyright published by the Senate Judiciary Committee, he has continued the high standard of accuracy, conciseness, and logical organization which have made previous editions of *Howell's Copyright Law* such a useful tool.

This new edition is an accurate reflection of the most recent trends in copyright legislation, administration, and litigation. Special attention is given to the classifications of copyrightable material and the ownership of and requisites for copyright. Especially valuable is a long and detailed chapter on the rights secured by copyright and how they may be infringed, followed up by a lucid discussion of the remedies for infringement.

Concluding chapters discuss international copyright relations, as well as taxation of copyrights, and state copyright legislation.

Extensive appendices provide a mine of important reference material, and a topical index and table of cases cited round out the volume.

To Place your order, write Department L

BNA Incorporated, 1231 24th Street, N.W., Washington 7, D.C.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIII

MAY 1962

NUMBER 3

CONTENTS

LEADING ARTICLES

SHUT-IN GAS WELL PROBLEMS *Leslie Moses* 267

MISSISSIPPI'S SIXTEENTH SECTION SCHOOL

LANDS *Semmes Luckett* 281

STATE SOVEREIGNTY AND THE RATIFICATION

OF THE CONSTITUTION—III *William P. Murphy* 292

STATE SOVEREIGNTY AND THE CONSTITUTION—

A SUMMARY VIEW *William P. Murphy* 353

STATE BAR SECTION

THE SENATE JUDICIARY COMMITTEE 360

STUDENT COMMENTS

CLAIMANT'S DUTY TO SUBMIT TO SURGERY IN MITIGATION

OF RECOVERY UNDER WORKMEN'S COMPENSATION 367

PLANNING FOR INDIVIDUAL LIFETIME CHARITABLE GIVING 381

RECENT DECISIONS

Bankruptcy—Reopening Proceedings to Reach an Estate

by the Entirety 399

Pleading—Election of Remedies as a Defense 401

Workmen's Compensation—Interpretation of the Statutory

Employer Clause 402

RECENT BOOKS

Selected Problems in the Law of Corporate Practice *Harry C. Griffith* 405

Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi,
and Baton Rouge, Louisiana, under the Act of Congress of March 3, 1879.
Published in December, March, May, and October

\$4.00 Per Annum

\$1.50 Per Current Number

EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIII

MAY 1962

NUMBER 3

MEMBERS OF THE LAW JOURNAL BOARD

BAR COMMITTEE

JOHN W. DULANEY, JR., *Chairman*
Tunica

WALTER R. BRIDGFORTH
Yazoo City

FRED C. DELONG
Greenville

JOE R. FANCHER, JR.
Canton

HUNTER M. GHOLSON
Columbus

WILLIAM F. GOODMAN
Jackson

CARROLL KEMP
Hazlehurst

W. CALVIN WELLS, JR.
Jackson

MISSISSIPPI STATE BAR 1961-62

OFFICERS

SHERWOOD W. WISE of Jackson..... President
C. SIDNEY CARLTON of Sumner..... First Vice-President
EATON A. LANG, JR. of Gulfport..... Second Vice-President
GENE A. WILKINSON of Jackson..... Public Relations Director
MRS. ALICE NEVELS of Jackson..... Secretary-Treasurer

COMMISSIONERS

ORMA R. SMITH..... Corinth
ALBERT SIDNEY JOHNSTON,
JR. Biloxi
LESTER F. SUMNERS..... New Albany
STANNY SANDERS..... Greenwood
JAY GORE, JR..... Grenada
HARRY L. CORBAN..... Fayette
K. HAYES CALLICUT..... Jackson
JAMES B. EVERETT..... Decatur
FRANK E. EVERETT, JR..... Vicksburg

RICHARD G. LORD, JR..... Meridian
WILLIAM H. BIZZELL..... Cleveland
HOMER W. PITTMAN..... Hattiesburg
JACK W. WALKER..... Mendenhall
J. MEREDITH WOOD..... Brookhaven
WILLIAM E. ANDREWS..... Purvis
J. WILMOT THOMPSON,
JR. Starkville
HERBERT M. FANT..... Sardis
GEORGE D. MAXEY..... Laurel

Mississippi Law Journal

VOLUME XXXIII

MAY 1962

NUMBER 3

SHUT-IN GAS WELL PROBLEMS†

*Leslie Moses**

I. INTRODUCTION

Any analysis of shut-in gas well problems is, perforce, speculative. To the extent that this article treats generally accepted doctrines, reliance upon applicable decisions is largely assumed. Few cases are cited, for there are but few precedents to be found. Questions are asked; the answers, if given, are worked out by principle and analogy, and sometimes even that process fails when the matter comes before the court. The subject is complex and covers many facets, but only a few are considered here. Any conclusions reached are open to debate.

Many years ago it was said that the law of oil and gas was in the same fluid state as the subject matter with which it deals. We are still witnessing its fluidity today. No more apt illustration can be given here than the subject of shut-in gas well royalty clauses found in the modern lease. The natural gas industry, as we know it, is of comparatively recent origin. In the early days of the oil industry only a limited amount of natural gas was used, and this was chiefly in sections of the country adjacent to producing gas fields. Because of the physical nature of gas, the only practical way to use it is to get it to a market by pipe lines. Pipe lines, however, are costly to build, and it was only after World War II and the consequent development of great oil transmission lines that the natural gas industry assumed a figure of major importance. Gas, unlike oil, cannot be stored in tanks pending sale. However, reserves play an important part in the sale of gas to a transmission company. Accordingly, one cannot obtain a market for his gas until after he has discovered a field. Even after one has obtained a producer, often he must drill several more wells before a transmission company is ready to enter into a long term contract with him. Because of both cost and reserve factors, a gas purchaser is in no hurry to lay a line to a well. Time plays an important part. Lack of ability to store as well as produce means that the well must

†This article is an excerpt from the SEVENTH ANNUAL INSTITUTE sponsored by the Rocky Mountain Mineral Law Foundation and published by Matthew Bender & Company, Inc., Albany 1, New York.

*Member of the Louisiana Bar; Attorney and Executive Assistant to the General Manager of Land Exploration & Production, Crown Central Petroleum Corporation, Houston, Texas.

be shut during the period of negotiations, the obtaining of FPC approval, and the laying of the line to the field. The operator, in bringing in a gas well in a wildcat field is usually faced with a dilemma. Under present conservation laws he cannot flare his gas into the air and attempt to market the condensate produced with it. His lessor, on the other hand, must sit idly by, knowing he has a commercial gas field underlying his land, yet finding no revenue coming in each month. Thus, disagreement between lessor and lessee usually results when a gas well is brought in and shut down. The lessee has no satisfactory alternative. Under the terms of the lease the payment of delay rentals are to postpone drilling on the lease. He has already drilled and found production. Having one shut-in well, he is hesitant to start drilling another until he has a market for his product, and he does not want to avail himself of the continuous operation clause. The dry-hole clause is of no value because he has not drilled a dry hole. Nevertheless, if there is no production from the lease at the expiration of the primary term, he automatically loses his lease.

This situation was very forcibly brought to the attention of the operators when a Texas court announced that the bringing in of a gas well capable of producing gas was not sufficient under the habendum clause of the lease unless there was actual production with it.¹ The court said that the lease was for a five year primary term and as long thereafter as oil or gas was being produced. The well was shut in at the expiration of the primary term and as a shut-in well did not constitute "production" under the lease, and, there being no production, the lease expired.

In view of this decision, a need was apparent for a new provision in the lease which would alter the operation of the habendum clause so that actual production would not be a condition precedent to the continuation of the lease after the expiration of the primary term. This provision would also have to balance the interests of both lessor and lessee so that lessor, as well as lessee, would be provided for if a well were shut in awaiting a market. The solution finally reached was a monetary substitute for paying production. Such would give the lessor cash in some form and permit the lessee to protect his investment while looking for a market. This provision was called the shut-in gas royalty clause of the lease, and, in some form or another, has been in common usage ever since. Being of fairly recent origin, the cases involving it are few, and because different leases have different clauses, the resulting lawsuits have been ones chiefly of construction of instruments. Far from ending the problems concerning shut-in gas wells, the cases have raised many additional problems, some of which have been solved inadequately, and many not at all.

Of some assistance, however, is the fact that in the short period of

¹Stanolind Oil & Gas Co. v. Barnhill, 107 S.W.2d 746 (Tex. Civ. App. 1937).

time that the shut-in royalty provision has been used, many articles have been written on the general subject.² These articles competently treat the background and general application of the clause. Such topics need not be developed further here. Suffice it to say that the clause was created to solve a special problem and is therefore essential; however, it has given birth to new problems which are as troublesome as the one it solved.

II. INTERRELATED PROBLEMS

A. Generally

Unfortunately, each new problem is so interrelated with the others that it is almost impossible to set up distinct categories for discussion. For organizational purposes, such problems will be categorized as an operator would treat them when bringing in a gas well and finding himself without a ready market for his gas. What does the operator do? He takes a look at his lease, reads the shut-in provision, finds that he has some matters to inquire into more closely, and possibly notes them down as follows:

1. Is the shut-in royalty payment a rental or a royalty payment?
2. What is the proper time for making the payment?
3. Is the payment mandatory or permissive?
4. If permissive, when can or should it be exercised?
5. If it is royalty, does it excuse the payment of delay rentals?
6. To whom and how should the payments be made?
7. What happens if there is intermittent production?
8. What happens under pooled gas units?

²Hardwicke, *Problems Arising Out of Royalty Clauses in Oil and Gas Leases*, 29 TEXAS L. REV. 790 (1951); Kolb, *Problems Arising out of the Payment of Shut-in Royalty in Texas*, 2 SO. TEX. L.J. 62 (1955); Malone, *The Evolution of Shut-in Royalty Law*, 11 BAYLOR L. REV. 19 (1959); Masterson, *The Shut-in Clause in Oil and Gas Leases*, 4 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 314 and 12 SW. L.J. 459 (1958). Maxwell, *Oil and Gas Lessee's Rights on Failure to Obtain Production During the Primary Term*, 3 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 133 (1957); Moses, *Operator's Problems with Shut-in Gas Wells*, 7 ROCKY MOUNTAIN MINERAL LAW INSTITUTE (1961); Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases* (pt. 1), 23 TUL. L. REV. 374 (1949); Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases* (pt. 2), 27 TUL. L. REV. 478 (1951); Moses, *Recent Problems in Connection with Shut-in Gas Royalty Problems in Oil and Gas Leases*, 10 LOYOLA L. REV. 1 (1960); Scurlock, *Practical Legal Problems in Delay Rental and Shut-in Royalty Payments*, 4 S.W. LEGAL FOUNDATION INSTITUTE 39 (1953); Shimer, *Construction and Drafting Problems in Shut-in Royalty Clauses*, 3 U.C.L.A.L. REV. 564 (1956); Walker, *Clauses in Oil Leases Providing for Payment of an Annual Sum as Royalty on a Non-Producing Gas Well*, 24 TEXAS L. REV. 478 (1946).

It can readily be seen that it is almost impossible to discuss one of the above points without considering elements of another. Yet, when the analysis is completed, all categories seem to fit together with sense—except as to the proper answers.

B. Rental or royalty?

If the shut-in payments are rentals, they go to the owners of executive rights exclusively. If they are royalties, they go to all of the royalty owners, whether or not they own any of the executive rights. The answer, therefore, makes a difference in how to pay, or to whom to pay, and means the difference between properly keeping a lease alive and possibly losing it.

Most of the lease forms in common usage in Mississippi, Texas, Louisiana, Oklahoma, and other states in this general area term the payment royalty. In California, however, the standard lease form calls such payment a rental³ as do some Louisiana forms.⁴ The courts, in determining the nature of the payment, are not bound by the label given such payment by the parties. While in various dicta the courts have indicated that they felt the payments to be royalty, it was not until 1952 in a landmark Texas case that a concrete, tangible ruling was obtained.⁵ In that case the shut-in payments amounted to about \$16,000 a year. Lessee paid the amount to the royalty owners, and various claimants instituted suit to determine whether the sums to be paid were rentals or royalties. In order to determine the nature of the payment the court had to ascertain whether production existed at the time of the payment. The lease proved that upon the making of the proper payment "such well shall be held to be a producing well," and the court held that such statement plainly indicated the intent of the parties to the lease. The payment was a substitute for production and converted the shut-in well into a constructive producer. The lease was thus being held by production, or, to be more exact, substitute production. Production relieves the lessee of the necessity of paying rentals, but requires the payment of royalties. Production maintains the lease in force beyond the primary term, and rentals do not. Here the lease clearly evidenced intent that it should be held by such payments beyond the primary term. Therefore the court held the payments to be royalty, not rental.

The Oklahoma court has held that sums required to be paid under the shut-in provisions were "in the nature" of royalty payments and were not to be considered as rental.⁶ The Louisiana court, by inference, held

³Oil Age Form 86-C (Revised), Clause 9 (1955).

⁴M. L. Bath Co. New South Louisiana Forms.

⁵Morris v. First Nat'l Bank, 249 S.W.2d 269 (Tex. Civ. App. 1952).

⁶Carlisle v. United Producing Co., 278 F.2d 893 (10th Cir. 1960).

the payment to be royalty.⁷ In that case an erroneous payment was made, and the lease was held to be valid. The court stated that the erroneous payment of royalty would not forfeit the lease unless it was so provided in the lease.

C. Proper time for payment

The proper time for payment presents a perplexing problem. Caution in making payment should be the keynote, since failure to pay in time will undoubtedly result in loss of the lease. Most of the lease forms in general use (except the latest ones) do not provide a time for payment. In *Freeman v. Magnolia Petroleum Co.*,⁸ the primary term of the lease expired in April 1940. Magnolia completed a gas well in December 1939, but shut it in for lack of market. Four months after the expiration of the primary term Magnolia tendered lessors the shut-in royalty, which was refused. The court held that there was neither actual nor substitute production at the end of the primary term and accordingly the lease expired. The court stated further that where there is no time specified in the lease for such a payment, payment must be made by the last day of the primary term in order to maintain the lease in force.

The case which has aroused the most interest in the subject is *Gulf Oil Corp. v. Reid*,⁹ decided by the Supreme Court of Texas in 1960. Gulf commenced a well one month prior to the expiration of the primary term and completed it as a gas producer two months later. The well was then shut in to await a market for the gas. One month after the last test of the well, Gulf tendered the shut-in payment to the royalty owners, who refused it. Gulf, in the meantime, was obtaining a market for the gas and building a line to the well. The trial court held that Gulf was diligent in searching for a market and building its line; that the well was tied in to the line within a reasonable time after it was shut-in; and that the shut-in payment was made within a reasonable time after the well was completed. The Supreme Court of Texas held the lease to have been terminated, making these specific findings:

- a. Discovery of gas in Texas does not amount to production.
- b. Production, in Texas, means actual production in paying quantities.
- c. The lessee is not permitted a reasonable time to find a market.
- d. The lessee is not permitted a reasonable time to pay his shut-in royalty.

In conclusion, the court stated:

To sum up, there was no production from the well during

⁷*Risingen v. Arkansas-Louisiana Gas Co.*, 198 La. 101, 3 So. 2d 289 (1941).

⁸171 S.W.2d 339 (Tex. 1943).

⁹337 S.W.2d 267 (Tex. 1960), noted in 32 Miss. L.J. 217 (1961).

the primary term of the lease as extended by drilling operations; the shut-in royalty was not paid so as to bring about constructive or contractual production, and no provision of the lease can be construed to furnish a further extension of the primary term or to make the tender of royalty in this case timely.¹⁰

Certainly the above is an unrealistic and stringent rule of law. The denial by the court of a reasonable time within which to make the payment appears to be a violation of not only the intent and purpose of the shut-in clause, but also of basic principles of the law of contracts. If the decision is to be strictly interpreted, a lessee must either have a pipe line connection waiting at the well-head at the time he completes the well, or have the shut-in payment on hand, in order to pay the moment the well is shut in. Obviously, neither is possible. In drilling wildcat wells it is impossible to know the type of production to be obtained until the well has been completed. Furthermore, it is elementary that a market can be obtained only after production has been uncovered, reserves and delivery capacity ascertained, and FPC approval secured. In addition, any practicing attorney knows that it is impossible to say with any degree of certainty to whom payments should be made, without a last minute check of the records. None of these things can be done within the time limit set out in the *Reid* case.

In another case involving time,¹¹ the primary term of the lease ended December 5, 1956. The gas well was completed in July 1956. In October 1956 lessee tendered the first shut-in payment, stating that it was for the period December 5, 1956, to December 5, 1957. Lessors rejected same contending that the yearly period began on the date the well was shut in. Lessee then tendered a second payment in cash, not mentioning the period covered. Subsequently, lessee tendered a third cash payment, again making the statement as to period, and thereafter made a fourth payment by check on December 5, 1956, identical to the first payment. The court held the lessee to be under no obligation to state the period which the payment covered, and, accordingly, held the second and third tenders to be proper. Due to the facts, the court did not have to consider the correctness of the first and fourth payments. While the problem of the proper anniversary date was stated by the court, it was neither discussed nor decided. Query: which was the proper anniversary date?

In a recent Texas case,¹² a gas well was completed two months prior to the expiration of the primary term. Shortly thereafter lessee mailed a check for the shut-in payment and secured a receipt from lessors which stated payment was for a year's period commencing a week after the well was shut in. The check was deposited by lessor. The check for the second

¹⁰*Id.* at 272.

¹¹*Vernon v. Union Oil Co.*, 270 F.2d 441 (5th Cir. 1959).

¹²*Steeple Oil & Gas Corp. v. Amend*, 337 S.W.2d 809 (Tex. Civ. App. 1960).

shut-in payment was tendered a month after the anniversary date as set out in the receipt. Lessor contended that the first payment was no good since it did not cover the period from the date the well was shut in and that the second payment was bad because it was made a month after the anniversary date. The court held the first payment to be valid, stating that the parties could, by agreement, fix their own anniversary date, which they did on the receipt. However, the second payment was made after the agreed anniversary date had passed; therefore the lease lapsed. Certainly the above holding raises a question in one's mind as to which is the correct anniversary of payment. If the lease contains the permissive shut-in clause (as discussed later), then the anniversary date is the date payment is made. A close reading of the above case shows that the court may have intimated that payment had to be made at the time the well was shut in. *Freeman v. Magnolia Petroleum Co.*¹³ held that payment had to be tendered prior to the expiration of the primary term, another point to be considered in making proper payment and a point which is still unsettled.

In view of the above cases, the matter of timeliness of payment can be condensed into one short statement: *The ultimate test of whether the payment is timely is whether actual production on the date of payment would have been sufficient to maintain the lease in force.* Also, once the anniversary date has been set, subsequent payments must be made on or before such anniversary date.

D. Mandatory or Permissive?

Until recently, most of the leases in general use contained what is termed the permissive shut-in provision. Such provision states that lessee "may" make such payment, and upon payment the lease will be considered as producing. A number of new forms use the words "shall pay." Under the permissive clause, the lessee is not required to make such a payment; the lessor could neither sue nor declare the lease forfeited if lessee did not avail himself of the clause. Which type of clause is to be preferred? Ten years ago it would have made little or no difference. In the light of recent jurisprudence it is submitted that the mandatory clause is more advantageous. In making this statement at the Rocky Mountain Mineral Law Institute in July 1961, the writer was questioned by a number of attorneys there, who held to the contrary. As a practical matter, however, whether the clause is permissive or mandatory is not of first importance; the provision is designed to protect the lessee from loss of his lease; consequently payment should be tendered immediately upon shutting in the well.

¹³171 S.W.2d 339 (Tex. 1943).

E. When should it be exercised?

Even when the clause is of the permissive type, it should be borne in mind that the habendum clause, which in most cases governs the matter of shut-in payments, does not require production until the expiration of the primary term. Professor Walker, in the first article ever written on the shut-in clause,¹⁴ stated that the lessee is not obligated to make payment until the end of the primary term. On the other hand, if the well was brought in early in the primary term and delay rentals were paid for several years thereafter, it might be argued that the lessee could not take advantage of the clause at the end of the primary term, since he had elected earlier not to make such payments. Therefore, the cautious lessee should commence upon shutting in the well, regardless of how early in the primary term it may be, and continue payments regularly thereafter.

F. Do the payments excuse the payment of rentals?

Shut-in provisions vary in language to a considerable degree. There are, however, two general types. Type A usually provides that upon payment "it will be considered that gas is being produced within the meaning of" the habendum clause. Type B usually provides that upon payment "this lease shall not terminate and it will be considered that gas is being produced . . . in paying quantities." Is the difference in language of sufficient importance to create a different obligation on the part of the lessee? Professor Walker states that the Type A clause only makes the well a producing well after the expiration of the primary term.¹⁵ This clause usually reads that the lease is for a given number of years "and as long thereafter as oil, gas or other mineral is produced from said land." Mr. Walker points out that the only effect under the Type A form is to put into operation the phrase "and as long thereafter." Consequently, the lease can not be maintained during the primary term, but only "thereafter." If his reasoning be correct, delay rentals must be paid during the primary term under the Type A clause.

It is submitted that the above is an incorrect interpretation of the language of the lease. Certainly, if a well were brought in during the primary term, and produced continuously thereafter, lessee would be excused from payment of delay rentals. If the payment is substitute production, as has been held by the courts, then the same reasoning should apply. As to the Type B clause, it is self-explanatory, since it provides that upon payment "it will be considered that gas is being produced." The real difference between the two clauses is a matter of

¹⁴Walker, *Clauses in Oil Leases Providing for Payment of an Annual Sum as Royalty on a Non-Producing Gas Well*, 24 TEXAS L. REV. 478 (1946).

¹⁵*Ibid.*

semantics only, the end result in each instance being the same. There are, however, cases concerning the subject. *Morriss v. First National Bank*¹⁶ involved a clause similar to Type A. The court held that the language "such well shall be held to be a producing well" under the habendum clause stated precisely the intent of the parties. Payment of the shut-in royalty was a substitute for production and constituted the well a producer. Because the lease was being maintained by production, or substitute production, the need for payment of delay rentals ceased. In *Carlisle v. United Producing Co.*¹⁷ the clause resembled both Types A and B, and provided that upon payment the well would be considered as producing. The court held that discovery of gas in paying quantities constituted a compliance with the production requirements of the habendum clause of the lease and went on to say that "the rental provisions were no longer applicable."

Surely the above opinions are sound in reasoning. In both cases the clause was mandatory, not permissive. It is possible that such fact may distinguish clauses in other leases which are permissive. It is believed that the courts will adopt the same view, however, should the difference be raised.

G. To whom and how should payments be made?

So long as the courts continue to hold the shut-in payments to be royalty, there will be no difficulty in determining to whom payments should be made. Shut-in royalties are payable to those persons who would receive ordinary royalty under the terms of the lease. The *Morriss* case explicitly held that under the shut-in clause royalties were payable to the participating and nonparticipating royalty owners.

There is to date no case law on the problem of how payments should be made. The lease stipulates that delay rentals are payable either to the lessor or to his credit in the named depository bank. No such option is given in most leases in payment of shut-in royalties. Custom and usage have given rise to the practice of using division orders for the payment of royalty, wherein the owners state where they want their checks sent. However, in view of the *Reid* and *Freeman* cases, the operator cannot postpone tender of payment until title has been examined and the division order has been prepared and signed. In the *Vernon* case there were four tenders, two by check and two by cash. Lessors refused all tenders. Unfortunately, while holding the cash tender to be valid, the court stated that it was unnecessary to pass upon the validity of the tender by check, since the lease was in force. Therefore, if the lease were silent as to how payment should be made, payment by check to the depository bank would be dangerous and probably

¹⁶249 S.W.2d 269 (Tex. Civ. App. 1952).

¹⁷278 F.2d 893 (10th Cir. 1960).

insufficient. Also, payment by check to the royalty owner might be held not to be legal tender. Cash payment direct to the lessor seems to be absolutely essential in such instances—the only safe, practical, and prudent way of handling the situation. Time permitting, however, the lessee could secure from the royalty owners written instructions to permit the payment to a depository bank. Thus, if the shut-in payment is terminal, in the sense that failure to pay would terminate the lease, the same care should be exercised as to timeliness and correctness of payment as is exercised for the payment of delay rentals.

Query: If overriding royalties are provided for under the lease, are the owners thereof entitled to receive any portion of the shut-in payment? Again there is no definite answer, except such as is dictated by common sense. Usually the override is carved out of the working interest of the lease and is not part of the landowner's royalty. Such being the case, the owner of the override should not be entitled to participate in or receive any portion of the shut-in payment.

H. Questions of Intermittent Production

The older form of lease provides for annual payment of shut-in royalty. It is not unusual for the lessee to make a spot sale of gas, usually for drilling purposes, after the annual shut-in payment has been made. In such instances, gas is being sold intermittently both during and after the expiration of the primary term. What is the effect of such a sale on the payment of shut-in royalty?

In hypothetical case A, a well is shut in and payment is made covering January 1 to January 1. On April 1 lessee can sell gas for drilling purposes on a temporary market. He does so for four straight months, until the demand for gas comes to an end. Lessee has been paid for the gas and has, in turn, paid royalty to the royalty owners. May he consider the payment made on January 1 to be sufficient to keep the lease alive, or must he tender another yearly payment on the second shut-in date (assuming such to be August 1)? If he makes the second payment, shall he consider January 1 next to be the proper anniversary date for the next payment or has he created a new anniversary date? Here again there are no answers in the cases. There is enough doubt concerning the situation to warrant advising a second payment August 1 and thereafter use same as the anniversary date for future payments. The royalty owner has been benefited rather than harmed.

In hypothetical case B, assume the same anniversary date of January 1. Again a temporary market has been obtained, but in this instance, instead of lasting a few months, it lasts until March 1 of the succeeding year, when the well is shut in. There is no doubt but that a second payment would not have been due on January 1, for the well was in production. Therefore, a second anniversary date of March 1 is set up for future payments.

The above problems have caused the drafters of lease forms to reconsider the old type clause in use and to change it to provide for either monthly or quarterly payments. Where there is a monthly payment provision, there is no problem, for when lessee is selling during a month, he need not pay the royalty. If the newer lease form is not used, the periodic resumption of payment of shut-in royalty must be regarded as a danger area; great care should be exercised. The lessee should consider an extra payment to be insurance against losing his lease.

I. Problems of Pooled Units

All the prior problems have been predicated upon the assumption of an operator drilling a well on a single lease. Is the situation any different where the well has been drilled upon a pooled unit where there are several leases or portions of several leases? In 1957 the Louisiana Supreme Court held that the completion of a shut-in gas well on a validly created unit was the same as production from each tract in the unit.¹⁸ The shut-in well, therefore, held the entire unit. In an earlier Louisiana case,¹⁹ the unit formed was a voluntary one as distinguished from a forced unit in the 1957 case. Here the court held that a shut-in well on the voluntarily created unit interrupted prescription on royalty on each tract in the unit and held all leases. Thus Louisiana has determined that a shut-in well on a unit, either voluntary or forced, is to be treated as a well on a single tract. On the basis of a 1959 case, Oklahoma is in accord.²⁰ No Mississippi cases have been found, but it would be reasonable to presume that the Mississippi courts would follow the Louisiana and Oklahoma rule.

The difficulty with pooled units is not the effect of the shut-in well on each tract, but how lessee should make shut-in payments. Should he pay each lease on the basis of the provisions of the well-site lease, pro-rating payment on an acreage basis? It is submitted that lessee should pay each lease on the basis of the shut-in provision of that particular lease, making no reduction because only part of the lease was in the unit. The writer has no authority for such a statement and has been criticized for it.

Suppose, for example, there are five leases in the unit, and only four have shut-in clauses. In accordance with the correct interpretation of the Louisiana and Oklahoma decisions, the fifth lease is held by virtue of the shut-in well. Here again, discussion with other attorneys discloses differences of opinion. If the lease has a pooling clause stating that production from any part of the unit holds the lease, it would be difficult for

¹⁸*Delatte v. Woods*, 232 La. 341, 94 So. 2d 281 (1957).

¹⁹*LeBlanc v. Haynesville Mercantile Co.*, 230 La. 299, 88 So. 2d 377 (1955).

²⁰*State ex rel. Commissioners v. Carter Oil Co.*, 336 P.2d 1086 (Okla. 1959).

a court to hold that the lease was not held by production, especially if the drill-site had a clause and was being held by substitute production. But what would lessee pay the royalty owners as substitute for production? It is submitted that lessee could pay them the same amount he pays the royalty owners under the drill-site.

III. CONCLUSION

This article must be concluded with the same warning with which it was begun. It behooves the prudent operator to have his shut-in clauses examined closely by his attorney if he is contemplating drilling immediately prior to the expiration of the primary term. The attorney should advise his client, in writing, of the consequences of bringing in a gas well immediately prior to or after the end of the primary term with no market for the gas. He should caution his client of the dangers of actually completing a gas well after the primary term without having paid his shut-in royalty before completion. Lessee's landman and his superintendent of production should cooperate in seeing that the advice is read, understood, and carried out. If such is not done, the consequences can be appalling.

The only other recommendation to be made is that the shut-in clause be improved. Any revision made should be done with great care, and only by those who have studied the evolution of the lease and this particular form, and who understand the grave problems involved. The revised clause should be broad enough to cover shut-in oil wells in addition to gas wells, permit the payment of shut-in royalty to the owners in their depository bank, give a period of grace for the making of payment, and provide for monthly payment. Recently a new form has appeared in Texas combining all of the above suggestions. It provides for monthly payments, protects lessee on sporadic sales, covers oil as well as gas, specifies that payments go to the royalty owners, gives one ninety days grace for making the first payment, permits payment in advance if desired, assumes payment as production for all purposes of the lease, makes payment to the bank rather than directly to the royalty owners, and seems to provide for all contingencies discussed. Its first appearance in the court is awaited with interest. The appendix contains a copy of the Texas clause with an analysis of the same.

There has been little law expounded here, since there are few cases. There have been many problems raised but few answers given. It is no wonder that one must finish such a paper as this with doubts and misgivings. The objections to the reasoning will be many, and they are readily and fully realized. They have been advanced, however, in the spirit of cooperative enterprise. If this paper arouses interest, creates discussion, and stimulates constructive thinking, it will have served its purpose.

APPENDIX

Comments

Monthly payments protest sporadic sales; the paying is mandatory; it covers oil as well as gas. Also includes 60-day shut-in period for clarity.

Specifies it is payable to the royalty owners.

Gives 90 days grace before first payment, satisfying the *Reid* case, and permits subsequent payments on or before that date.

Permits prepayment, and if sale during prepaid period you do not begin over again.

Production is assumed for all purposes of the lease, not just the habendum clause.

New Clause

To pay monthly shut-in royalty at the rate of \$_____ per month, for any period in excess of sixty (60) consecutive days that production of oil, gas or other mineral is shut in by Lessee for lack of a satisfactory and acceptable market or by reason of force majeure; provided, that no shut-in royalty shall be due or payable while oil, gas, or other mineral is being produced and marketed hereunder, or while this lease is continued by drilling operations in accordance with Section 6 hereunder. Shut-in royalty shall be paid to the owners of the royalty, and the first monthly payment shall be due ninety (90) days after production is so shut in or drilling operations under Section 6 have ceased, whichever is the later date, and monthly thereafter on or before the same day of each month until production is commenced or resumed or the lease is maintained in force in some other manner. Lessee may, at any time and from time to time, prepay such monthly shut-in royalty for such period of time as Lessee may elect. Where shut-in royalty has been paid as above provided, production or operations thereafter, followed by another shut-in, shall not require the payment of additional shut-in royalty during the period for which such royalty has been so paid. As long as the production of oil, gas or other mineral is shut in for lack of such market or by reason of force majeure, it shall be considered for all purposes hereof that oil, gas

Since the payment is mandatory, failure to pay is not fatal and does not constitute forfeiture. Lessor can sue for the money.

or other mineral is being produced hereunder, and this lease shall continue in effect both during and after the primary term, and continuation of this lease shall not be conditioned on the payment of shut-in royalty, but the amount of such payment shall be a debt which Lessee shall be obligated to pay.

NOTE: While this section of the lease does not permit the payment of shut-in royalties to the account of lessor in the depository bank, another section reads thusly: "Lessor names the _____ Bank at _____, and each successor thereof, as the depository under this lease for the payment of delay rentals and *all other sums* payable hereunder. . ." (Emphasis added.) It seems, therefore, that this point, too, is adequately taken care of.

MISSISSIPPI'S SIXTEENTH SECTION SCHOOL LANDS

*Semmes Luckett**

To understand the history of Mississippi's sixteenth section school lands, it is necessary to go back to the origins of the state. When the English colonized the eastern seaboard of the United States they came over in various capacities, each group armed with a grant from the English crown. In each grant the territory which the particular group was expected to colonize, and to which each group was given title by the crown of England, was described, although imperfectly. The grants included lands far beyond the boundaries of the states which bear the names of the original colonies.

The land northwest of the Ohio River, which later became known as the Northwest Territory, was given to New York, Pennsylvania, and Connecticut. Those states, after their western boundaries were established by the newly formed central government, adopted the Ordinance of 1785 for the disposition by sale of the public lands in the western territory. In that ordinance it was provided that every sixteenth section in every township of the public lands should be set aside for the maintenance of public schools.¹

In 1787 Congress adopted an ordinance for the government of the Northwest Territory. The appropriation of public lands for the maintenance of public schools became a fundamental principle of the Ordinance of 1787, which settled the terms of the compact between the people and the states of the Northwest Territory and the original states. It provides in part: "Religion, morality, and knowledge being necessary to good government, the preservation of liberty and the happiness of mankind, schools and the means of education shall forever be encouraged."²

The territory now included in the states of Alabama and Mississippi belonged to Georgia, having been included in the grant given to Georgia by the crown of England. In 1802 Georgia and the United States entered into a solemn compact, by the terms of which Georgia ceded to the United States the territory now included within Alabama and Mississippi with the provision that when it became a state, it would be admitted to the Union "on the same conditions and restrictions, with the same provisions, and in the same manner as is provided in the Ordinance of Congress on the 13th day of July, 1787, for the government of the western territory of the United States, which Ordinance shall in all parts extend to the territory contained in the present act of cession, that

*Roberson, Luckett & Roberson; Clarksdale, Mississippi.

¹28 J. Cont. Congress 251, 254 (April 12, 1785, Library of Congress 1922).

²32 J. Cont. Congress 334, 340 (July 13, 1787, Library of Congress 1936).

article only excepted which forbids slavery."³ Thus the provisions in the Ordinance of 1787, for the government of the Northwest Territory became a part of the compact between Georgia and the United States.

Pursuant to its compact with Georgia, the United States Congress passed an act in 1803⁴ for the sale of lands south of Tennessee and west of Georgia, with a provision therein that all of those lands to which the titles of the Indian tribes had been extinguished should be surveyed and that all which had not been sold, with the exception of sixteenth sections, should be sold. Section sixteen in each township was reserved for the support of the local schools.

When the lands were surveyed, it was discovered that some sixteenth section lands had already been sold, either by the United States or England. Therefore, in 1806, Congress adopted another act, in which "lieu lands" came into existence. It provided that "whenever the section number sixteen shall fall upon land already granted, by virtue of any act of Congress, or claimed by virtue of a British grant, the secretary of the treasury shall locate another section in lieu thereof, for the use of schools, which location shall be made in the same township, if there be any other vacant section therein, and otherwise, in an adjoining township."⁵ Mississippi's "lieu lands" lie in the counties along the Gulf of Mexico. For instance, Coahoma County has part of a section, 367.89 acres, in Hancock County.

All of the foregoing is rather easily understood, but now comes a more difficult part of the story. It grows out of the fact that there were Indians here before England ever heard of this country, before Georgia received its grant, and before the United States was formed. The Choc-taws were in possession of the land lying south and west of a line made by extending the boundary line between Coahoma County and Tunica County in a southeasterly direction. The Chickasaws held sway in all or parts of the twenty-four counties north and east of that line. It is uncertain as to what sort of title the Indians had to the lands in Mississippi. In *Jones v. Madison County*⁶ the court quoted with approval a statement from the Supreme Court of the United States in *Gaines v. Nicholson*⁷ to the effect that the Indians had a "right of occupancy." But in the Ordinance of 1787, which became a part of the agreement between Georgia and the United States, it was provided:

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from

³Articles of Cession and Agreement, entered into April 24, 1802 by the Commissioners appointed by the United States pursuant to an act of 1798, 1 Stat. 549 (1798), and the State of Georgia. Miss. Code of 1857, pp. 646, 647.

⁴2 Stat. 229 (1803).

⁵2 Stat. 400 (1806).

⁶72 Miss. 777, 18 So. 87 (1895).

⁷50 U.S. (9 How) 356 (1850).

them without their consent; and, in their property rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them.⁸

Further, in the act of Congress relating to the sale of the lands in this state,⁹ it was provided that the title of the state would not be perfected until the title of the Indians had been extinguished. Thus, the title of the Indians, whatever its nature, had to be gotten rid of before the settlers could get the lands they desired.

The legal question was whether any power resided in the federal government or in the states to dispossess the Indians by forcing them to sell their lands and remove to distant and unknown lands. The fundamental question was one of right and wrong. It was resolved contrary to the principles of equity and justice, and sadly, resort was had to the teachings of Christianity for justification. For instance, in one case the Supreme Court of Tennessee, quoting Lord Coke, said:

All infidels are, in law, perpetual enemies, for the law presumes not that they will be converted; that being a remote possibility, for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace; for the Apostle saith (II Cor. 6:16) "And what concord hath Christ with Belial? or what part hath he that believeth with an infidel?"¹⁰

The Indians were removed from Mississippi—the Choctaws, in September 1830, by the Treaty of Dancing Rabbit Creek,¹¹ and the Chickasaws in 1832, by the Treaty of Pontotoc Creek.¹² The other party to the treaty, in both instances, was the United States.

The differences between the two treaties had far reaching results, which still are felt today. Those differences consisted, in so far as the present subject is concerned, in the fact that in the Treaty of Dancing Rabbit Creek, the Choctaws ceded to the United States the entire country they owned east of the Mississippi River, while in the Treaty of Pontotoc Creek the lands of the Chickasaws were ceded to the United States for the purpose of sale by the latter, the former to receive the net proceeds of the sales. Thus, the sixteenth sections in the Choctaw country became school lands, and the sixteenth sections in the Chickasaw country never became school lands. Residents of the former Choctaw country, governed by the Treaty of Dancing Rabbit Creek, are more

⁸32 J. Cont. Congress 334, 340-41 (July 13, 1787, Library of Congress 1936).

⁹2 Stat. 229 (1803).

¹⁰State v. Foreman, 8 Yerg. 256, 265-66 (Tenn. 1835).

¹¹Treaty with the Choctaws, Sept. 27, 28, 1830, 7 Stat. 333.

¹²Treaty with the Chickasaws, Oct. 20, 1832, 7 Stat. 381.

fortunate, as shall be pointed out, than residents of what was the Chickasaw country, governed by the Treaty of Pontotoc Creek.

Congress tried to compensate those counties in the Chickasaw country for the losses sustained from the fact that their sixteenth section lands are not school lands. In 1836¹³ it set aside a large body of land elsewhere in the state as school lands for those twenty-four counties with lands wholly or partly in the Chickasaw territory. Those lands were sold under an 1848 act¹⁴ of the Mississippi legislature, and the money was paid into the state treasury. It annually distributes the interest on that fund—the Chickasaw School Fund—to those counties. Last year Tunica County was paid \$2,850.86 in such interest. Compare that with Coahoma County's \$73,551.92 derived from its sixteenth section lands, and one will begin to realize the benefit of being a Choctaw rather than a Chickasaw. One can also draw the obvious conclusion therefrom that legislation authorizing the sale or the long term leasing of school lands is, except when unusual circumstances prevail, unwise legislation.

Once the title of the state to the school lands became vested—which was when the Indians' right of occupancy was extinguished and the lands were surveyed—the power and authority to deal with them was automatically lodged with the legislature, subject only to such limitations as could be found in the constitution of Mississippi. But the Supreme Court of Mississippi was a long time recognizing the fact.

Probably the first case to present the court with the opportunity to correctly define the state's title to the lands was that of *Connell v. Woodard* in 1841.¹⁵ In that case the point was made that the reservation by Congress of the sixteenth section lands for the use of schools was not a grant to the state so as to authorize the various acts of the legislature which had, from time to time, been passed allowing the leasing or sale thereof. But the court refused to consider the point, saying: "This power has been so long recognized and acted on, that we do not feel inclined to question it at this time, even if we entertained any doubts of its existence."¹⁶ Then in 1859 the court, in seeking to determine the power and authority of the Mississippi legislature over the school lands, made the monumental error, in *Hester v. Crisler*,¹⁷ of assuming that the Act of Congress of 1803 was the original act by which the lands were devoted to school purposes. The court then concluded that no title to the sixteenth section lands, either legal or equitable, passed to the state by that act. Said the court:

It is apparent from an examination of the various acts of Congress, that until the passage of the Act of 1852, the govern-

¹³5 Stat. 116 (1836).

¹⁴Miss. Laws 1848, § 112 at 62.

¹⁵6 Miss. (5 How) 665 (1841).

¹⁶*Id.* at 672.

¹⁷36 Miss. 681 (1859).

ment of the United States retained the legal title to the land in controversy, as well as all other sixteenth sections reserved from sale (in this State), by the Act of 1803, for the support of schools in the townships. It is equally clear that, whatever may have been the intention of Congress, or the benevolent purposes of the Act of 1803, no power was ever conferred by any direct proceeding or act, upon either the State, the township, or the trustees, to carry into effect the purposes of that act, after the Act of 9th January, 1815, until the Act of the 19th May, 1852.

* * *

Whatever the State of Mississippi may have supposed, nothing can be more certain than that she held no title, legal or equitable, to these lands, for herself or in trust, until the Act of 1852. And before then her authority, except so far as it has been sanctioned and ratified by the government of the United States, by that act and the Act of 1857, had been permissive, sub silentio, and was but an assumption.¹⁸

From this decision in 1859 down to the decision in *Jones v. Madison County*,¹⁹ decided in 1895, these conclusions were adhered to by the courts of the state. Title to the school lands was considered to be in the United States, and the state was believed to have only that authority to deal with them as was given it from time to time by Congress. But in *Jones v. Madison County*,²⁰ *Hester v. Crisler*,²¹ and all cases which followed, it was overruled.

The error in *Hester v. Crisler* is, and it is one going to the very root of the question, that the court accepted the act of congress of 1803 as the original act by which these lands were devoted to school purposes for the benefit of the inhabitants of the townships in which they are situated. Beginning with the postulate that these lands belonged to the United States, to be dealt with at its will, and therefore, that the right of the inhabitants of the township sprang from a donation by Congress, the conclusion that the state had only such power as had been given by Congress would be a correct one. The mistake in the conclusion arises from the fact that the postulate is erroneous. The right of the inhabitants of the townships to have the lands for school purposes arises, not from the act of congress, but from the act of cession of the state of Georgia of 1802. That state, and not the United States, is the donor. The United States never had the shadow of a right to these lands, save as trustee for the inhabitants of the prospective states which the act itself stipulated should be created.²²

¹⁸*Id.* at 683, 684.

¹⁹72 Miss. 777, 18 So. 87 (1895).

²⁰72 Miss. 777, 18 So. 87 (1895).

²¹36 Miss. 681 (1859).

²²*Jones v. Madison County*, 72 Miss. 777, 798, 18 So. 87, 90 (1895).

The conclusion that Georgia, not the United States, was the donor of the school lands, and that the State of Mississippi, upon its creation as a state, acquired title thereto and absolute control thereof, was reiterated in *Street v. City of Columbus*,²³ *Pace v. State*,²⁴ *Gill v. Johnson*,²⁵ and *Lambert v. State*.²⁶

The statement that Georgia, not the United States, was the donor of our school lands is subject to question. At the beginning it was pointed out that sixteenth section lands were set aside for the maintenance of public schools by the Ordinance of 1785 for the sale of the public lands in the western territory. But in the treaty between Georgia and the United States, it was the Ordinance of 1787 for the government of the Northwest Territory, not the Ordinance of 1785, that was referred to.²⁷ Therefore, it would seem that the correct statement with respect thereto is this statement from *City of Corinth v. Robertson*: "They were donated to the state by the United States pursuant to its general policy for the support of schools and its agreement with the state of Georgia."²⁸ However, it all adds up to the same thing: Georgia should be recognized as the true donor of the lands. And the title of Mississippi thereto, as trustee, became vested with the creation of the state and the extinguishment of the title of the Indians.

In the meantime, the legislature—before 1852, acting on the assumption that it had the inherent right so to do, and after 1852, acting on the supposed authority of various acts of Congress—had been legislating with respect to the school lands. How it exercised its power and authority is an interesting story.

It appears that the legislature, up until 1833, used every precaution to safely carry out and administer this trust for the use and benefit of the common schools.²⁹ In 1818, one year after the writing of our first constitution, the legislature provided that these lands could be leased for a period of time not longer than three years, provided the inhabitants of the township agreed thereto, and that due precaution should be taken to protect the timber thereon.³⁰ In 1824 the legislature increased the length of the lease from three to five years, but likewise

²³75 Miss. 822, 23 So. 773 (1895).

²⁴25 Miss. 54 (1852).

²⁵206 Miss. 707, 40 So. 2d 600 (1949).

²⁶171 Miss. 474, 158 So. 139 (1934).

²⁷Articles of Cession and Agreement, entered into April 24, 1802 by the Commissions appointed by the United States pursuant to an act of 1798, 1 Stat. 549 (1798), and the State of Georgia. Miss. Code of 1857, pp. 646, 647.

²⁸125 Miss. 31, 63, 87 So. 464, 468.

²⁹Miss. Laws 1833, § 1 at 452.

³⁰Miss. Laws 1818 (Hutchinson's Code, ch. 9, art. 2 at 205).

provided that the growing timber should be protected for the use and benefit of the public schools.³¹

But in 1833 there began a sad story of neglect of the interest of the school children in these lands, of abuse of the trust confided in the state. For instance, in 1830 the legislature decided to go into the banking business and chartered the Planters Bank with an authorized capital of \$3 million.³² That being an almost unheard of figure for that day, the raising of the capital proved impossible, and so the legislature latched on to the school lands. It adopted an act in 1833 which permitted the leasing of the sixteenth section lands for ninety-nine years and the investment of the proceeds in the bank's stock.³³ That was done with much of the school lands. The bank failed.

In 1836 the legislature, seeing that many of the people in the township would not consent to the leasing of the land for ninety-nine years when the proceeds were to be invested in bank stock, passed an act again authorizing the leasing for ninety-nine years, but provided that the proceeds of the lease could be invested in bank stock or loaned to individuals at interest.³⁴ This opened the gate to additional leasing, and the money was loaned out to individuals. In many instances, loans to individuals were made to friends of officeholders and was never collected. In 1846 the legislature created a commission to handle the schools and the school lands, and directed that all of the lands which were not presently leased should be leased for a period of ninety-nine years.³⁵ The principal was to be invested and loaned out, and only the interest was to be spent for the common schools.

In 1871 the legislature passed an act which remained in existence until 1878, authorizing a sale of the lands.³⁶ That may come as a surprise to those who have read *Weiler v. Monroe County*,³⁷ in which the supreme court said that there was never in this state any legislative authority to sell in fee these lands. But as the court said later in *Foster v. Jefferson County*, "It requires no elaboration of discussion to support the declaration that it is not within the power of any court to wipe a plain statute out of an official code by the ipse dixit that there is no such statute."³⁸

So it was that shortly after 1846 all of the land that had not been leased or sold at that time was leased for ninety-nine years, and all the money received therefrom was to be held as an endowment for the

³¹Miss. Laws 1824, § 4 at 19.

³²Miss. Laws 1830, at 237.

³³Miss. Laws 1833, § 1 at 452.

³⁴Miss. Laws 1836, § 4 at 541.

³⁵Miss. Laws 1846, ch. 2, § 1 at 98.

³⁶Miss. Laws 1871, ch. 39, art. 7, § 2015 at 439.

³⁷4 Miss. 682, 22 So. 188 (1897).

³⁸202 Miss. 629, 636, 32 So. 2d 126, 128 (1947).

public schools of the township in which the land was located, and only the interest was to be spent. The money from the leasing had been invested in bank stock or loaned to individuals. Most of it was lost because of the bank's failure and because of the failure to press for collection of the loans.

That being the situation when the Constitutional Convention of 1890 convened, it was decided that there should be put into the new constitution as section 211, a provision that school lands should not be sold nor leased for a longer term than ten years for a gross sum, or for a term not exceeding twenty-five years for a ground rental, payable annually. In 1944 section 211 was amended so as to permit ninety-nine year leases of school lands in a municipality. Recently, section 211 was amended so as to permit sales or ninety-nine year leases of school lands for industrial purposes.³⁹

Thus, under our constitution as it now stands, the legislature may authorize:

(a) the leasing of school lands within a municipality for a period of ninety-nine years, without restriction as to the purpose for which they are to be used;

(b) the sale or the leasing of school lands for ninety-nine years, whether they are within or outside a municipality, provided they are to be used for industrial purposes;

(c) the leasing of school lands outside a municipality for a gross sum, provided they are leased for no longer than ten years;

(d) the leasing of school lands outside a municipality for a period of twenty-five years, provided they are leased for a ground rental, payable annually.

The legislature, in implementing section 211, has authorized:

(1) the leasing of school lands within a municipality for a period of ninety-nine years, without restriction as to the purpose for which they are to be used;

(2) the sale or the leasing of school lands for ninety-nine years, whether they are within or outside a municipality, if they are to be used for industrial purposes;

(3) the leasing of school lands outside a municipality, in a county which does not lie wholly within a levee district, for a gross sum, for a term not exceeding ten years;

(4) the leasing of school lands outside a municipality, in a county which does not lie wholly within a levee district, for a period not exceeding twenty-five years for a ground rental, payable annually;

(5) the leasing of school lands outside a municipality, in a county which lies wholly within a levee district, for a gross sum, for a term

³⁹Miss. Laws 1st Extraordinary Sess. 1961, ch. 10, § 211 at 14.

not exceeding ten years, if they are not to be used for agricultural purposes;

(6) the leasing of school lands outside a municipality, in a county which lies wholly within a levee district, for a period not exceeding twenty-five years for a ground rental, payable annually, if they are not to be used for agricultural purposes;

(7) the leasing of school lands outside a municipality, in a county which lies wholly within a levee district, for five years, for agricultural purposes other than the cultivation of rice or pasturage;

(8) the leasing of school lands outside a municipality, in a county which lies wholly within a levee district, for fifteen years, for the cultivation of rice or pasturage;

(9) the sale of all merchantable timber on school lands. (The lessees of the school lands are prohibited from cutting and using any timber thereon except for fuel and necessary repairs and improvements on the leased premises.)

The mechanics of the several transactions authorized by the legislature, and the rules under which they are negotiated, vary. For instance:

(a) In those counties which do not lie wholly within a levee district, the lessee of school lands, at the expiration of his lease, has a prior right, exclusive of all other persons, to release or extend his lease on terms agreeable to himself and the board of supervisors of the county wherein the land lies.

(b) In those counties which lie wholly within a levee district and have two judicial districts, the lessee of school lands situated within a municipality, and the lessee of school lands outside a municipality which are not leased for agricultural purposes, has a prior right, exclusive of all other persons, at the expiration of his lease, to release or extend his lease on terms agreeable to himself and the board of supervisors of the county wherein the land lies.

(c) In those counties which lie wholly within a levee district, the lessee of school lands leased for agricultural purposes has no prior right to extend or renew his lease.

(d) Leases of school lands in counties which lie wholly within a levee district, which are leased for agricultural purposes, are made by the county superintendent of education, with the approval of the board of supervisors.

(e) The county superintendent of education has nothing to do with the making of leases of school lands other than the leases mentioned in the preceding paragraph. All leases other than those mentioned in the preceding paragraph are made by the board of supervisors.

(f) School lands in counties which lie wholly within a levee district can not be leased for agricultural purposes without the same having

been advertised for rent in a newspaper published in the county for two successive weeks, the first being at least ten days prior to said public contract.

(g) No advertisement is required as a condition precedent to the making of a lease other than those mentioned in the preceding paragraph.

(h) Merchantable timber on school lands can not be sold except upon competitive bids, which can be required to be sealed competitive bids, and after legal advertisement of such sale for three weeks in a newspaper published in the county.

There is another statutory rule which deserves attention. It grows out of a statute adopted in 1958⁴⁰ which requires the state, or any agency or subdivision thereof, or any private organization, corporation, association, or person which acquires, by condemnation or otherwise, any easement or right of way across any school lands, to pay adequate compensation therefor. The statute was probably enacted because the Mississippi court had declared, in *Washington County v. Levee Commissioners*,⁴¹ that a levee district which takes school lands for levee purposes is only obligated to pay for the lessee's interest therein and is under no obligation to pay for the interest of the school children therein. The State Highway Commission was accorded the same privilege in *Board of Supervisors v. State Highway Commission*.⁴² It is quite understandable why the legislature passed the statute. There is no justification for the State Highway Commission or a levee district not compensating the school children of the township whose lands they propose to take.

Since the statutes governing the leasing of school lands for agricultural purposes vary so greatly, the question as to the best rules for such leasings naturally arises. It is not difficult to find the answer. The solution is prompted by the fact that the state holds each section of school lands as trustee for the school children of the particular township in which the land lies and by the well established rules which define the duties of a trustee. Those rules, simply stated, are that a trustee should act solely for the welfare of his beneficiary, and that a trustee should exercise the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question. Measured by those rules, it is submitted that:

(1) No lessee should be given a prior or exclusive right to renew or extend his lease. Such privileges undoubtedly chill the bidding for the lands. No private owner would extend such privilege to the lessee of his own lands.

(2) The leases should be made by the county superintendent of education, with the approval of the board of supervisors. A county su-

⁴⁰Miss. Laws 1958, ch. 303, § 20 at 509.

⁴¹171 Miss. 80, 156 So. 872 (1934).

perintendent of education will be more apt to look out after the interests of the school children.

(3) The lands should be advertised for rent in a newspaper published in the county for two successive weeks, the first being at least ten days prior to the leasing. Obviously, the more people who know about the lands being up for leasing, the better chance for a good offer for the lands, and the less chance for favoritism.

(4) The lands should be leased upon competitive sealed bids. In that way favoritism will be ruled out. Anyone who has attended a public letting will appreciate the benefit of sealed bids. Frequently, the highest sealed bid, or lowest, as the case may be, is thousands of dollars over or under the next best bid. It would barely exceed, or be just under, the next bid if the matter bid on were to be let on open bids.

The foregoing rules are those followed in the leasing of school lands for agricultural purposes in Coahoma County, and their value has been proven by results. All, with the exception of the requirement of competitive bidding, with sealed bids, are required by statute for such leasings in that county. The added requirement—competitive bidding with sealed bids—was adopted at the suggestion of an attorney who well appreciated the duty of a trustee to be loyal to his beneficiary and to manage the affairs of the trust confided to him as he would his own affairs. The school children in the remaining counties of the state which have school lands have the right to expect the same sort of regard for their best interests from those entrusted with the duty of leasing the school lands in their respective counties.

⁴²188 Miss. 274, 194 So. 743 (1940).

STATE SOVEREIGNTY AND THE RATIFICATION OF THE CONSTITUTION—III†

William P. Murphy*

RATIFICATION IN VIRGINIA

Although ratification by New Hampshire assured the number requisite to put the Constitution in operation, the accession of Virginia and New York to the plan was still essential to its success. Failure of either state to ratify would have meant a geographically fragmented nation, as well as the loss of the particular strength and resources each state had to offer. This was especially true of Virginia, for she was at this time and for a generation afterward the foremost of all the states in population, wealth and political influence.

The Virginia legislature, on October 25, 1787, authorized a convention to assemble on the first Monday of June, 1788. In the interim both friends and foes of the Constitution put forth every effort to influence the voters in the election of delegates. Washington was especially active in this his home state. In the convention of one hundred and seventy members which assembled on June 2, 1788, the strength of the Federalists and anti-Federalists was very nearly equal. With the exception of Washington, Jefferson (who was serving as minister to France) and Richard Henry Lee, virtually all of Virginia's most prominent citizens were chosen.

Madison was the leader of the Federalist forces, assisted mainly by Randolph, John Marshall, and George Nicholas. At the head of the opposition was Patrick Henry, who had declined appointment as a delegate to the Federal Convention with the statement that he "smelled a rat." He was now backed by George Mason, William Grayson and James Monroe. At times the Convention assumed the mien of a personal debate between Henry and Madison, thus affording a striking study in contrasts. Henry was a flamboyant and emotional orator, while Madison relied on quiet and rational persuasion. The convention unanimously chose Pendleton, chancellor of the state, as its president. Although it was voted to discuss the Constitution part by part in sequence, in

†This article continues a study which began with *State Sovereignty Prior to the Constitution*, 29 Miss. L.J. 115 (1958); continued with *State Sovereignty and the Founding Fathers*, 30 Miss. L.J. 135 (1959); 30 Miss. L.J. 261 (1959); and 31 Miss. L.J. 50 (1959); continued with *State Sovereignty and the Drafting of the Constitution*, 31 Miss. L.J. 203 (1960); 32 Miss. L.J. 1 (1960); 32 Miss. L.J. 155 (1961); and 32 Miss. L.J. 227 (1961); and continued with *State Sovereignty and the Ratification of the Constitution*, 33 Miss. L.J. 29 (1961), and 33 Miss. L.J. 164 (1962).

*Professor of Law, University of Mississippi.

fact the discussion frequently ranged over the whole plan without restriction. The Virginia convention debates are recorded more fully than in any other state.

The principal objection levied against the Constitution throughout the convention was that it created a national and consolidated government instead of a confederation, and that the powers granted were so extensive and limitless as to inevitably reduce the states to insignificance and destroy the liberties of the people. Henry lost no time in plunging into the attack. On June 4 he stated: "I would make this inquiry of those worthy characters who composed a part of the late federal Convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederation. That this is a consolidated government is demonstrably clear; and the danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand, What right had they to say, *We, the people*? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of, *We, the people*, instead of, *We, the state*? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states."²⁶⁰ "The federal Convention ought to have amended the old system; for this purpose they were solely delegated; the object of their mission extended to no other consideration."²⁶¹

Randolph, who had refused to sign the Constitution as a delegate to the Federal Convention, now arose and announced that he had decided, in the interest of union, to support it. In response to Henry, he said, "The gentleman then proceeds, and inquires why we assumed the language of '*We, the people*.' I ask, Why not? The government is for the people; and the misfortune was, that the people had no agency in the government before."²⁶² "What harm is there in consulting the people on the construction of a government by which they are to be bound? Is it unfair? Is it unjust? If the government is to be binding on the people, are not the people the proper persons to examine its merits or defects? I take this to be one of the least and most trivial objections that will be made to the Constitution; it carries the answer with itself."²⁶³

Mason supported Henry. "Mr. Chairman, whether the Constitution be good or bad, the present clause clearly discovers that it is a national government, and no longer a Confederation. I mean that clause which

²⁶⁰3 DEBATES IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 22 (Elliot ed. 1836).

²⁶¹*Id.* at 23.

²⁶²*Id.* at 28.

²⁶³*Id.* at 29.

gives the first hint of the general government laying direct taxes. The assumption of this power of laying direct taxes does, of itself, entirely change the confederation of the states into one consolidated government. This power, being at discretion, unconfined, and without any kind of control, must carry every thing before it. The very idea of converting what was formerly a confederation to a consolidated government is totally subversive of every principle which has hitherto governed us. This power is calculated to annihilate totally the state governments. Will the people of this great community submit to be individually taxed by two different and distinct powers? Will they suffer themselves to be doubly harassed? These two concurrent powers cannot exist long together; the one will destroy the other; the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former."²⁶⁴ After questioning the inadequacy of representation in the lower house, he stated: "But my principal objection is, that the Confederation is converted to one general consolidated government, which, from my best judgment of it, (and which perhaps will be shown, in the course of this discussion, to be really well founded,) is one of the worst curses that can possibly befall a nation. Does any man suppose that one general national government can exist in so extensive a country as this? I hope that a government may be framed which may suit us, by drawing a line between the general and state governments, and prevent that dangerous clashing of interest and power, which must, as it now stands, terminate in the destruction of one or the other. When we come to the judiciary, we shall be more convinced that this government will terminate in the annihilation of the state governments: the question then will be, whether a consolidated government can preserve the freedom and secure the rights of the people."²⁶⁵

The next day—Thursday, June 5—the convention met as a committee of the whole, with George Wythe in the chair. Pendleton, now on the floor, arose to reply to Henry's challenge of the previous day. "But an objection is made to the form: the expression, We, the people, is thought improper. Permit me to ask the gentleman who made this objection, who but the people can delegate powers? Who but the people have a right to form government? The expression is a common one, and a favorite one with me. The representatives of the people, by their authority, is a mode wholly inessential. If the objection be, that the Union ought to be not of the people, but of the state governments, then I think the choice of the former very happy and proper. What have the state governments to do with it? Were they to determine, the people would not, in that case, be the judges upon what terms it was adopted."²⁶⁶

²⁶⁴*Ibid.*

²⁶⁵*Id.* at 33.

²⁶⁶*Id.* at 37.

Then, in reply to Mason, he stated: "But it is represented to be a consolidated government, annihilating that of the states—a consolidated government, which so extensive a territory as the United States cannot admit of, without terminating in despotism. If this be such a government, I will confess, with my worthy friend, that it is inadmissible over such a territory as this country. Let us consider whether it be such a government or not. I should understand a consolidated government to be that which should have the sole and exclusive power, legislative, executive, and judicial, without any limitation. Is this such a government? Or can it be changed to such a one? It only extends to the general purposes of the Union. It does not intermeddle with the local, particular affairs of the states."²⁶⁷ "It is the interest of the federal to preserve the state governments; upon the latter the existence of the former depends: the Senate derives its existence immediately from the state legislatures; and the representatives and President are elected under their direction and control; they also preserve order among the citizens of their respective states, and without order and peace no society can possibly exist. Unless, therefore, there be state legislatures to continue the existence of Congress, and preserve order and peace among the inhabitants, this general government, which gentlemen suppose will annihilate the state governments, must itself be destroyed. When, therefore, the federal government is, in so many respects, so absolutely dependent on the state governments, I wonder how any gentleman reflecting on the subject, could have conceived an idea of a possibility of the former destroying the latter."²⁶⁸

Henry's response was to reiterate and elaborate on his original premise. "I rose yesterday to ask a question which arose in my own mind. When I asked that question, I thought the meaning of my interrogation was obvious. The fate of this question and of America may depend on this. Have they said, We, the states? Have they made a proposal of a compact between states? If they had, this would be a confederation. It is otherwise most clearly a consolidated government. The question turns, sir, on that poor little thing—the expression, We, the *people*, instead of the *states*, of America. I need not take much pains to show that the principles of this system are extremely pernicious, impolitic, and dangerous. Is this a monarchy, like England—a compact between prince and people, with checks on the former to secure the liberty of the latter? Is this a confederacy, like Holland—an association of a number of independent states, each of which retains its individual sovereignty? It is not a democracy, wherein the people retain all their rights securely. Had these principles been adhered to, we should not have been brought to this alarming transition, from a confederacy to a con-

²⁶⁷*Id.* at 39-40.

²⁶⁸*Id.* at 40.

solidated government. . . . Here is a resolution as radical as that which separated us from Great Britain. It is radical in this transition; our rights and privileges are endangered, and the sovereignty of the states will be relinquished: and cannot we plainly see that this is actually the case?"²⁶⁹ "I have said that I thought this a consolidated government: I will now prove it. . . . Suppose the people of Virginia should wish to alter their government; can a majority of them do it? No; because they are connected with other men, or, in other words, consolidated with other states. When the people of Virginia, at a future day, shall wish to alter their government, though they should be unanimous in this desire, yet they may be prevented therefrom by a despicable minority at the extremity of the United States. The founders of your own Constitution made your government changeable: but the power of changing it is gone from you. Whither is it gone? It is placed in the same hands that hold the rights of twelve other states; and those who hold those rights have right and power to keep them. It is not the particular government of Virginia: one of the leading features of that government is, that a majority can alter it, when necessary for the public good. This government is not a Virginian, but an American government. Is it not, therefore, a consolidated government?"²⁷⁰ During this lengthy discourse, Henry also condemned the "unlimited and unbounded power of taxation," which, together with other powers of Congress which had been taken from the states, "will reduce the power of the latter to nothing."

The next day Madison rose to reply to Henry. "Give me leave to say something of the nature of the government. . . . the principal question is, whether it be a federal or consolidated government. In order to judge properly of the question before us, we must consider it minutely in its principal parts. I conceive myself that it is of a mixed nature; it is in a manner unprecedented; we cannot find one express example in the experience of the world. It stands by itself. In some respects it is a government of a federal nature; in others, it is of a consolidated nature. Even if we attend to the manner in which the Constitution is investigated, ratified, and made the act of the people of America, I can say, notwithstanding what the honorable gentleman has alleged, that this government is not completely consolidated, nor is it entirely federal. Who are parties to it? The people—but not the people as composing one great body; but the people as composing thirteen sovereignties. Were it, as the gentleman asserts, a consolidated government, the assent of a majority of the people would be sufficient for its establishment; and, as a majority have adopted it already, the remaining states would be bound by the act of the majority, even if they unanimously reprobated it. Were it such a government as is suggested, it

²⁶⁹*Id.* at 44.

²⁷⁰*Id.* at 55.

would be now binding on the people of this state, without having had the privilege of deliberating upon it. But, sir, no state is bound by it, as it is, without its own consent. Should all the states adopt it, it will then be a government established by the thirteen states of America, not through the intervention of the legislatures, but by the people at large. . . . If Virginia was separated from all the states, her power and authority would extend to all cases: in like manner, were all powers vested in the general government, it would be a consolidated government; but the powers of the federal government are enumerated; it can only operate in certain cases; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction."²⁷¹ "But it is urged that its consolidated nature, joined to the power of direct taxation, will give it a tendency to destroy all subordinate authority; that its increasing influence will speedily enable it to absorb the state governments. I cannot think this will be the case. If the general government were wholly independent of the governments of the particular states, then, indeed, usurpation might be expected to the fullest extent. But, sir, on whom does this general government depend? It derives its authority from these governments, and from the same sources from which their authority is derived. The members of the federal government are taken from the same men from whom those of the state legislatures are taken. If we consider the mode in which the federal representatives will be chosen, we shall be convinced that the general will never destroy the individual governments; and this conviction must be strengthened by an attention to the construction of the Senate."²⁷²

On Saturday, June 7, Francis Corbin joined in the Federalist reply to Henry. "The introductory expression of 'We, the people,' has been thought improper by the honorable gentleman. I expected no such objection as this. Ought not the people, sir, to judge of that government whereby they are to be ruled?"²⁷³ "The powers of the general government are only of a general nature, and their object is to protect, defend, and strengthen the United States; but the internal administration of government is left to the state legislatures, who exclusively retain such powers as will give the states the advantage of small republics, without the danger commonly attendant on the weakness of such governments. There are controversies even about the name of this government. It is denominated by some a federal, by others a consolidated government. The definition given of it by my honorable friend (Mr. Madison) is, in my opinion, accurate. Let me, however, call it by another name—a representative federal republic, as contradistinguished from a confederacy."²⁷⁴

²⁷¹*Id.* at 93-95.

²⁷²*Id.* at 96.

²⁷³*Id.* at 104.

²⁷⁴*Id.* at 107.

Henry's attack on the taxing power was answered by Randolph and Madison. Randolph said that "I beg the friends of the Union to consider the necessity of this power: without it we may abandon the government altogether: it is the soul of the government; no substitute will answer in its stead. The history of other confederacies will instruct us that the general government must operate on the individuals of the community, or else be totally insufficient. Not ancient confederacies only, but certain modern ones, will point out to us the horrid situation in which these states must be involved, unless the general government be vested with this power."²⁷⁵ And Madison stated: "If a government depends on other governments for its revenues—if it must depend on the voluntary contributions of its members—its existence must be precarious. A government which relies on thirteen independent sovereignties for the means of its existence, is a solecism in theory and a mere nullity in practice. Is it consistent with reason that such a government can promote the happiness of any people?"²⁷⁶ "If the general government is to depend on the voluntary contribution of the states for its support, dismemberment of the United States may be the consequence. In cases of imminent danger, the states more immediately exposed to it only would exert themselves; those remote from it would be too supine to interest themselves warmly in the fate of those whose distresses they did not immediately perceive. The general government ought, therefore, to be empowered to defend the whole Union."²⁷⁷

Henry renewed his attack on the taxing power with vigor. Seizing upon figures of speech used by Randolph and Madison, he declared: "The power of direct taxation was called by the honorable gentleman the *soul* of the government: another gentleman called it the *lungs* of the government. . . . Must I give my soul, my lungs, to Congress?"²⁷⁸ "I tell you, they shall not have the soul of Virginia. They tell us that one collector may collect the federal and state taxes. The general government being paramount to the state legislatures, if the sheriff is to collect for both,—his right hand for Congress, his left for the state,—his right hand being paramount over the left, his collections will go to Congress. We shall have the rest. Deficiencies in collections will always operate against the states. Congress, being the paramount, supreme power, must not be disappointed. Thus Congress will have an unlimited, unbounded command over the soul of this commonwealth. After satisfying their uncontrolled demands, what can be left for the states? Not a sufficiency even to defray the expense of their internal administration. They must therefore glide imperceptibly and gradually out of existence. This, sir,

²⁷⁵*Id.* at 128.

²⁷⁶*Id.* at 128-29.

²⁷⁷*Id.* at 132.

²⁷⁸*Id.* at 148.

must naturally terminate in a consolidation. If this will do for other people, it never will do for me."²⁷⁹ Then, adverting to an argument of Madison based on implication, Henry poured forth all the dread which a strict constructionist feels for such an approach. "If they can use implication for us, they can also use implication against us. We are giving power; they are getting power; judge, then, on which side the implication will be used! When we once put it in their option to assume constructive power, danger will follow. Trial by jury, and liberty of the press, are also on this foundation of implication. If they encroach on these rights, and you give your implication for a plea, you are cast; for they will be justified by the last part of it, which gives them full power 'to make all laws which shall be necessary and proper to carry their power into execution.' Implication is dangerous, because it is unbounded; if it be admitted at all, and no limits be prescribed, it admits of the utmost extension. They say that every thing that is not given is retained. The reverse of the proposition is true by implication. They do not carry their implication so far when they speak of the general welfare—no implication when the sweeping clause comes. Implication is only necessary when the existence of privileges is in dispute. The existence of powers is sufficiently established. If we trust our dearest rights to implication, we shall be in a very unhappy situation."²⁸⁰ Thus ended the first week's debate.

On Monday, June 9, Henry again took the initiative, this time directing his remarks to Madison's analysis of the previous Friday. "We are told that this government, collectively taken, is without an example; that it is national in this part, and federal in that part, etc. We may be amused, if we please, by a treatise of political anatomy. In the brain it is national; the stamina are federal; some limbs are federal, others national. The senators are voted for by the state legislatures; so far it is federal. Individuals choose the members of the first branch; here it is national. It is federal in conferring general powers, but national in retaining them. It is not to be supported by the states; the pockets of individuals are to be searched for its maintenance. What signifies it to me that you have the most curious anatomical description of it in its creation? To all the common purposes of legislation, it is a great consolidation of government."²⁸¹

Henry then drew a graphic word picture of the reduced role the states would play under the Constitution. "You are not to have the right to legislate in any but trivial cases; you are not to touch private contracts; you are not to have the right of having arms in your own defence; you cannot be trusted with dealing out justice between man

²⁷⁹*Id.* at 149.

²⁸⁰*Id.* at 149-50.

²⁸¹*Id.* at 171.

and man. What shall the states have to do? Take care of the poor, repair and make highways, erect bridges, and so on, and so on? Abolish the state legislatures at once. What purposes should they be continued for? Our legislature will indeed be a ludicrous spectacle—one hundred and eighty men marching in solemn, farcical procession, exhibiting a mournful proof of the lost liberty of their country, without the power of restoring it. But, sir, we have the consolation that it is a mixed government; that is, it may work sorely on your neck, but you will have some comfort by saying, that it was a federal government in its origin.

"I beg gentlemen to consider: lay aside your prejudices. Is this a federal government? Is it not a consolidated government for almost every purpose? Is the government of Virginia a state government after this government is adopted? I grant that it is a republican government, but for what purposes? For such trivial domestic considerations as render it unworthy the name of a legislature. I shall take leave of this political anatomy, by observing that it is the most extraordinary that ever entered into the imagination of man. If our political diseases demand a cure, this is an unheard-of medicine."²⁸²

Henry in his speech also singled out for attack Congress's power over elections. "Congress is to have a discretionary control over the time, place, and manner of elections. The representatives are to be elected, consequently, when and where they please. As to the time and place, gentlemen have attempted to obviate the objection by saying, that the time is to happen once in two years, and that the place is to be within a particular district, or in the respective counties. But how will they obviate the danger of referring the *manner* of election to Congress? . . . According to the mode prescribed, Congress may tell you that they have a right to make the vote of one gentleman go as far as the votes of a hundred poor men. The power over the manner admits of the most dangerous latitude. They may modify it as they please. They may regulate the number of votes by the quantity of property, without involving any repugnancy to the Constitution."²⁸³

Lee of Westmoreland rebuked Henry for his lack of national spirit and his appeals to localism. "I ask if it be fair to attempt to influence gentlemen by particular applications to local interests? I say, it is not fair. Am I to be told, when I come to deliberate on the interest of Virginia, that it obstructs the interest of the county of Westmoreland? Is this obstruction a sufficient reason to neglect the collective interests of Virginia? Were it of a local nature, it would be right to prefer it; but, being of a general nature, the local interest must give way. I trust, then, that gentlemen will consider that the object of their deliberations

²⁸²*Ibid.*

²⁸³*Id.* at 175-76.

is of a general nature."²⁸⁴ "The people of America, sir, are one people. I love the people of the north, not because they have adopted the Constitution, but because I fought with them as my countrymen, and because I consider them as such. Does it follow from hence that I have forgotten my attachment to my native state? In all local matters I shall be a Virginian: in those of a general nature, I shall not forget that I am an American."²⁸⁵

The next day Monroe addressed himself to the dangers of the powers granted in the Constitution. "What are the powers which the federal government ought to have? I will draw the line between the powers necessary to be given to the federal, and those which ought to be left to the state governments. To the former I would give control over the national affairs; to the latter I would leave the care of local interests."²⁸⁶ In particular, he criticized the taxing power. "What is the extent of the power of laying and collecting direct taxes? Does it not give to the United States all the resources of the individual states? Does it not give an absolute control over the resources of all the states? If you give the resources of the several states to the general government, in what situation are states left? I therefore think the general government will preponderate."²⁸⁷ He also centered his attack on the necessary and proper clause, saying that "There is a general power given to them to make all laws that will enable them to carry their powers into effect. There are no limits pointed out. They are not restrained or controlled from making any law, however oppressive in its operation, which they may think necessary to carry their powers into effect . . . I conceive that such general powers are very dangerous. Our great unalienable rights ought to be secured from being destroyed by such unlimited powers, either by a bill of rights, or by an express provision in the body of the Constitution."²⁸⁸

Monroe considered that conflict between the national and state governments was inevitable. "As to the harmony between the governments, communion of powers, legislative and judicial, forbids it. I have never yet heard or read, in the history of mankind, of a concurrent exercise of power by two parties, without producing a struggle between them."²⁸⁹ In this conflict he argued that under the Constitution the states would be the losers. "Besides its possession of all the resources of the country, there are other circumstances that will enable it to triumph in the conflict with the states. Gentlemen of influence and character,

²⁸⁴*Id.* at 181-82.

²⁸⁵*Id.* at 178-79.

²⁸⁶*Id.* at 214.

²⁸⁷*Id.* at 216.

²⁸⁸*Id.* at 218.

²⁸⁹*Id.* at 219.

men of distinguished talents, of eminent virtue, and great endowments, will compose the general government. In what a situation will the different states be, when all the talents and abilities of the country will be against them?"²⁹⁰

John Marshall then made his first address to the convention, arguing that the powers granted were necessary and amply safeguarded. Nicholas then undertook to answer part of Monroe's argument. "The gentleman has adverted to what he calls the *sweeping clause*, etc., and represents it as replete with great dangers. . . . The committee will perceive that the Constitution had enumerated all the powers which the general government should have, but did not say how they were to be exercised. It therefore, in this clause, tells how they shall be exercised. Does this give any new power? I say not. Suppose it had been inserted, at the end of every power, that they should have power to make laws to carry that power into execution; would this have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all. This clause only enables them to carry into execution the powers given to them, but gives them no additional power."²⁹¹

On Wednesday, Madison answered Monroe's argument that the national government would overwhelm the states by asserting that in fact it would probably be just the other way around. ". . . it is proper to compare the state governments with the general government, with respect to reciprocal dependence, and with respect to the means they have of supporting themselves, or of encroaching on one another. At the first comparison, we must be struck with these remarkable facts. The general government has not the appointment of a single branch of the individual governments, or of any officers within the states, to execute their laws. Are not the states integral parts of the general government? Is not the President chosen under the influence of the state legislatures? May we not suppose that he will be complaisant to those from whom he has his appointment, and from whom he must have his reappointment? The senators are appointed altogether by the legislatures. . . . Besides this, will not the people (whose predominant interest will ultimately prevail) feel great attachment to the state legislatures? They have the care of all local interests—those familiar domestic objects, for which men have the strongest predilection. The general government, on the contrary, has the preservation of the aggregate interest of the Union—objects which, being less familiar, and more remote from men's notice, have a less powerful influence on their minds. Do we not see great and natural attachments arising from local considerations? This will be the case in a much stronger degree in the state governments than

²⁹⁰*Id.* at 216.

²⁹¹*Id.* at 245-46.

in the general government. The people will be attached to their state legislatures from a thousand causes; and into whatever scale the people at large will throw themselves, that scale will preponderate."²⁹² "I conceive that the fact will be, that the state governments, and not the general government, will preponderate. It cannot be contradicted that they have more extensive means of influence. I have my fears as well as the honorable gentleman, but my fears are on the other side. Experience, I think, will prove (though there be no infallible proof of it here) that the powerful and prevailing influence of the states will produce such attention to local considerations as will be inconsistent with the advancement of the interest of the Union."²⁹³ He sought to minimize the extent of national powers by stating that "The powers of the general government relate to external objects, and are but few. But the powers in the states relate to those great objects which immediately concern the prosperity of the people. . . . I should not complete the view which ought to be taken of this subject, without making this additional remark,—that the powers vested in the proposed government are not so much an augmentation of powers in the general government, as a change rendered necessary for the purpose of giving efficacy to those which were vested in it before."²⁹⁴

Mason immediately took issue with Madison on the latter point. "It is urged that no new power is given up to the general government, and that the Confederation had those powers before. . . . I say, then, there are great and important powers, which were not transferred to the state government, given up to the general government by this Constitution. Let us advert to the 6th article."²⁹⁵ After reading the su-

²⁹⁵*Id.* at 265-66.

premacy clause, he asked: "Now, sir, if the laws and Constitution of the general government, as expressly said, be paramount to those of any state, are not those rights with which we were afraid to trust our own citizens annulled and given up to the general government? The bill of rights is a part of our own Constitution. The judges are obliged to take notice of the laws of the general government; consequently, the rights secured by our bill of rights are given up. If they are not given up, where are they secured? By implication! Let gentlemen show they are secured in a plain, direct, unequivocal manner. It is not in their power."²⁹⁶

To Mason, amendments were essential. "We wish only our rights to be secured. We must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on

²⁹⁶*Id.* at 266.

²⁹²*Id.* at 257-58.

²⁹³*Id.* at 259.

²⁹⁴*Ibid.*

a doubtful ground. We wish to give the government sufficient energy, on real republican principles; but we wish to withhold such powers as are not absolutely necessary in themselves, but are extremely dangerous. We wish to shut the door against corruption in that place where it is most dangerous—to secure against the corruption of our own representatives. We ask such amendments as will point out what powers are reserved to the state governments, and clearly discriminate between them and those which are given to the general government, so as to prevent future disputes and clashing of interests. Grant us amendments like these, and we will cheerfully, with our hands and hearts, unite with those who advocate it, and we will do everything we can to support and carry it into execution. But in its present form we never can accede to it.”²⁹⁷

Grayson then spoke in opposition, especially against the taxing power. “As to direct taxation—give up this, and you give up every thing, as it is the highest act of sovereignty: surrender up this inestimable jewel, and you throw away a pearl richer than all your tribe.”²⁹⁸ Continuing his remarks the next day, he stated that “In my opinion, the states which give up the power of taxation have nothing more to give. The people of that state which suffers any power but her own immediate government to interfere with the sovereign right of taxation are gone forever. Giving the right of taxation is giving the right to increase the miseries of the people. Is it not a political absurdity to suppose that there can be two concurrent legislatures, each possessing the supreme power of direct taxation? If two powers come in contact, must not the one prevail over the other? Must it not strike every man’s mind, that two unlimited, coequal, coordinate authorities, over the same objects, cannot exist together?”²⁹⁹

Grayson also disputed Madison’s claim that in the contest for power the states would preponderate. “I am of opinion that it will be directly the reverse. What influence can the state governments be supposed to have, after the loss of their most important rights? Will not the diminution of their power and influence be an augmentation of those of the general government? Will not the officers of the general government receive higher compensation for their services than those of the state governments? Will not the most influential men be employed by Congress? I think the state governments will be condemned and despised as soon as they give up the power of direct taxation; and a state, says Montesquieu, should lose her existence sooner than her importance.”³⁰⁰

²⁹⁷*Id.* at 271-72.

²⁹⁸*Id.* at 280.

²⁹⁹*Id.* at 284.

³⁰⁰*Id.* at 287-88.

Pendleton replied to Grayson on both points. On the first, "To come to the great object of direct taxation, more immediately under consideration:—If we find it our interest to be intimately connected with the other twelve states, to establish one common government, and bind in one ligament the strength of thirteen states, we shall find it necessary to delegate powers proportionate to that end; for the delegation of adequate powers in this government is no less necessary than in our state government. To whom do we delegate these powers? To our own representatives. Why should we fear so much greater dangers from our representatives there, than from those we have here? Why make so great a distinction between our representatives here, and in the federal government, where every branch is formed on the same principle—preserving throughout the representative, responsible character?"³⁰¹

On the second point, Pendleton stated: "But we are told that there will be a war between the two bodies equally our representatives, and that the state government will be destroyed, and consolidated into the general government. I stated before, that this could not be so. The two governments act in different manners, and for different purposes—the general government in great national concerns, in which we are interested in common with other members of the Union; the state legislature in our more local concerns. Is it true, or merely imaginary, that the state legislatures will be confined to the care of bridges and roads? I think that they are still possessed of the highest powers. Our dearest rights,—life, liberty, and property,—as Virginians, are still in the hands of our state legislature. If they prove too feeble to protect us, we resort to the aid of the general government for security. The true distinction is, that the two governments are established for different purposes, and act on different objects; so that, notwithstanding what the worthy gentlemen said, I believe I am still correct, and insist that, if each power is confined within its proper bounds, and to its proper objects, an interference can never happen. Being for two different purposes, as long as they are limited to the different objects, they can no more clash than two parallel lines can meet. Both lay taxes, but for different purposes. The same officers may be used by both governments, which will prevent a number of inconveniences. If an invasion, or insurrection, or other misfortune, should make it necessary for the general government to interpose, this will be for the general purposes of the Union, and for the manifest interest of the states."³⁰²

Henry now came to the support of Grayson and also answered Madison. "The state governments, says he, will possess greater advantages than the general government, and will consequently prevail. His opin-

³⁰¹*Id.* at 299-300.

³⁰²*Id.* at 301.

ion and mine are diametrically opposite. Bring forth the federal allurements, and compare them with the poor, contemptible things that the state legislatures can bring forth. On the part of the state legislatures, there are justices of the peace and militia officers; and even these justices and officers are bound by oath in favor of the Constitution. A constable is the only man who is not obliged to swear paramount allegiance to this beloved Congress. On the other hand, there are rich, fat, federal emoluments. Your rich, smug, fine, fat, federal officers—the number of collectors of taxes and excises—will outnumber any thing from the states.”³⁰³ “Can, then, the state governments look it in the face? You dare not look it in the face now, when it is but in embryo. The influence of this government will be such, that you never can get amendments; for if you propose alterations, you will affront them. Let the honorable gentleman consider all these things, and say, whether the state governments will last as long as the federal government.”³⁰⁴ Then, replying to Pendleton, “With submission to the honorable gentleman’s opinion, I assert that there is danger of interference, because no line is drawn between the powers of the two governments, in many instances; and, where there is a line, there is no check to prevent the one from encroaching upon the powers of the other. I therefore contend that they must interfere, and that this interference must subvert the state government, as being less powerful.”³⁰⁵

On Saturday, June 14, Mason raised objection to Congress’s power over the militia, saying that “unless there be some restrictions on the power . . . we may very easily see that it will produce dreadful oppressions. . . . Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, etc. Here is a line of division drawn between them—the state and general governments. The power over the militia is divided between them. The national government has an exclusive right to provide for arming, organizing, and disciplining the militia, and for governing such part of them as may be employed in the services of the United States. The state governments have the power of appointing the officers, and of training the militia, according to the discipline prescribed by Congress, if they should think proper to prescribe any. Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretense of establishing a standing army.”³⁰⁶ He said that he wanted an amendment that “the militia of any state should not be marched beyond the limits of the adjoining state; and if it be necessary

³⁰³*Id.* at 322-23.

³⁰⁴*Id.* at 323.

³⁰⁵*Id.* at 325.

³⁰⁶*Id.* at 378-79.

to draw them from one end of the continent to the other, I wish such a check, as the consent of the state legislature, to be provided."³⁰⁷ "By these amendments I would give necessary powers, but no unnecessary power. If the clause stands as it is now, it will take from the state legislatures what divine Providence has given to every individual—the means of self-defence. Unless it be moderated in some degree, it will ruin us, and introduce a standing army."³⁰⁸

Madison replied that "The most effectual way to guard against a standing army, is to render it unnecessary. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia, and exert the whole natural strength of the Union, when necessary."³⁰⁹ "If you limit their power over the militia, you give them a pretext for substituting a standing army. If you put it in the power of the state governments to refuse the militia, by requiring their consent, you destroy the general government, and sacrifice particular states. The same principles and motives which produce disobedience to requisitions, will produce refusal in this case."³¹⁰

Nicholas took issue with Mason's proposed amendment. "The worthy member has said, that it ought to be a part of the Constitution that the militia ought not to go out of the state without the consent of the state legislature. What would be the consequence of this? The general defence is trusted to the general government. How is it to protect the Union? It must apply to the state governments before it can do it. Is this right? Is it not subjecting the general will to the particular will, and exposing the general defence to the particular caprice of the members of the state governments? This would entirely defeat the power given to Congress to provide for the general defence; and unless the militia were to aid in the execution of the laws when resisted, the other powers of Congress would be nugatory, . . . the general government is separate and perfectly distinct from the individual governments of the states. Should Congress be obliged to apply to the particular states for the militia, they may be refused, and the government overturned. . . . If the general government be obliged to apply to the states, a part will be thereby rendered superior to the whole."³¹¹

Now that the Federalists had defended both the taxing and militia powers, Henry triumphantly affected to see this as proof of his charge of a national, consolidated government. "Mr. Chairman, it is now confessed that this is a national government. There is not a single federal feature in it. It has been alleged, within these walls, during the debates, to be national and federal, as it suited the arguments of gentlemen.

³⁰⁷*Ibid.*

³⁰⁸*Id.* at 381.

³⁰⁹*Ibid.*

³¹⁰*Id.* at 383.

³¹¹*Id.* at 390.

"But now, when we have heard the definition of it, it is purely national. The honorable member was pleased to say that the sword and purse included every thing of consequence. And shall we trust them out of our hands without checks and barriers? The sword and purse are essentially necessary for the government. Every essential requisite must be in Congress. Where are the purse and sword of Virginia? They must go to Congress. What is become of your country? The Virginian government is but a name. It clearly results, from his last argument, that we are to be consolidated. . . .

"The means, says the gentleman, must be commensurate to the end. How does this apply? All things in common are left with this government. There being an infinitude in the government, there must be an infinitude of means to carry it on."³¹² "In this the creature has destroyed and soared above the creator. For if its powers be infinite, what rights have the people remaining? By that very argument, despotism has made way in all countries where the people unfortunately have been enslaved by it. We are told, the sword and purse are necessary for the national defence. The junction of these, without limitation, in the same hands, is, by logical and mathematical conclusions, the description of despotism."³¹³

The third week started off with Henry again complaining of Congress's power to raise armies and call out the militia. Mason joined in the attack, saying that "The objection was, that too much power was given to Congress—power that would finally destroy the state governments more effectually by insidious, underhanded means, than such as could be openly practised. This, said he, is the opinion of many worthy men, not only in this Convention, but in all parts of America."³¹⁴ "He was convinced the state governments ought to have the control of the militia, except when they were absolutely necessary for general purposes."³¹⁵ Otherwise, he said, ". . . it must finally produce, most infallibly, the annihilation of the state governments."³¹⁶ Henry then charged that since Congress was granted power to call out the militia, "it appeared to him, most decidedly, that the power of suppressing insurrections was *exclusively* given to Congress. If it remained in the states, it was by implication."³¹⁷

Corbin, in reply to Mason, said: "The gentleman had told us that nothing could be more humiliating than that the *state governments* could not control the general government. He thought the gentleman

³¹²*Id.* at 395-96.

³¹³*Id.* at 396.

³¹⁴*Id.* at 415.

³¹⁵*Id.* at 416.

³¹⁶*Ibid.*

³¹⁷*Id.* at 417

might as well have complained that one county could not control the state at large."³¹⁸ And Marshall then answered Henry. "The state governments did not derive their powers from the general government; but each government derived its powers from the people, and each was to act according to the powers given it. Would any gentleman deny this? He demanded if powers not given were retained by implication. Could any man say so? Could any man say that this power was not retained by the states, as they had not given it away? For, says he, does not a power remain till it is given away? The state legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away. . . . The truth is, that when power is given to the general legislature, if it was in the state legislature before, both shall exercise it; unless there be an incompatibility in the exercise by one to that by the other, or negative words precluding the state governments from it. But there are no negative words here. It rests, therefore, with the states. To me it appears, then, unquestionable that the state governments can call forth the militia, in case the Constitution should be adopted, in the same manner as they could have done before its adoption."³¹⁹

Henry, however, argued that Marshall's interpretation was not the correct one. "But the right interpretation (and such as the nations of the earth had put upon the concession of power) was that, when power was given, it was given exclusively. . . . That the powers given to Congress were exclusively given, was very obvious to him. The rights which the states had must be founded on the restrictions on Congress. He asked, if the doctrine which had been so often circulated, that rights not given were retained, was true, why there were negative clauses to restrain Congress. He told gentlemen that these clauses were sufficient to shake all their implication; for, says he, if Congress had no power but that given to them, why restrict them by negative words? Is not the clear implication this—that, if these restrictions were not inserted, they could have performed what they prohibit?"³²⁰

Henry then levied his argument on the necessary and proper clause. "By this they have a right to pass any law that may facilitate the execution of their acts. . . . Is there any act, however atrocious, which they cannot do by virtue of this clause?"³²¹ "The sweeping clause will fully enable them to do what they please. What could the most extravagant son undertake to answer him on this point. "If that latitude of con- and boundless imagination ask, but power to do every thing?"³²² Madi-

³¹⁸*Ibid.*

³¹⁹*Id.* at 419.

³²⁰*Id.* at 422.

³²¹*Id.* at 436.

³²²*Id.* at 437.

struction which he contends for were to take place with respect to the sweeping clause, there would be room for those horrors. But it gives no supplementary power. It only enables them to execute the delegated powers. If the delegation of their powers be safe, no possible inconvenience can arise from this clause. It is at most but explanatory. For when any power is given, its delegation necessarily involves authority to make laws to execute it. Were it possible to delineate on paper all those particular cases and circumstances in which legislation by the general legislature would be necessary, and leave to the states all the other powers, I imagine no gentleman would object to it. But this is not within the limits of human capacity. The particular powers which are found necessary to be given are therefore delegated generally, and particular and minute specification is left to the legislature."³²³

Mason, however, refused to accept Madison's explanation. "Mr. Chairman, gentlemen say there is no new power to be given by this clause. Is there any thing in this Constitution which secures to the states the powers which are said to be retained? Will powers remain to the states which are not expressly guarded and reserved?"³²⁴ "There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States. This clause has never been complained of, but approved by all. Why not, then, have a similar clause in this Constitution, in which it is the more indispensably necessary than in the Confederation, because of the great augmentation of power vested in the former? In my humble apprehension, unless there be some such clear and finite expression, this clause now under consideration will go to any thing our rulers may think proper. Unless there be some express declaration that every thing not given is retained, it will be carried to any power Congress may please."³²⁵

Henry reiterated his view of the construction which would obtain. "I repeat, that all nations have adopted this construction—that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers."³²⁶ "It was expressly declared in our Confederation that every right was retained by the states, respectively, which was not given up to the government of the United States. But there is no such thing here. You, therefore, by a natural and unavoidable implication, give up your rights to the general government."³²⁷ Grayson also "thought it questionable whether rights not given up were reserved. A majority of the states, he observed, had expressly reserved certain important rights

³²³*Id.* at 438-39.

³²⁴*Id.* at 441.

³²⁵*Id.* at 442.

³²⁶*Id.* at 445.

³²⁷*Id.* at 446.

by bills or rights, and that in the Confederation there was a clause declaring expressly that every power and right not given up was retained by the states. It was the general sense of America that such a clause was necessary; otherwise, why did they introduce a clause which was totally unnecessary? . . . so extensive was the power of the legislation, in his estimation, that he doubted whether, when it was once given up, *any thing* was retained."³²⁸

On Wednesday, June 18, the treaty power came under fire. "Mr. Henry begged gentlemen to consider the condition this country would be in if two thirds of a quorum should be empowered to make a treaty: they might relinquish and alienate territorial rights, and our most valuable commercial advantages. In short, if any thing should be left us, it would be because the President and senators were pleased to admit it. The power of making treaties, by this Constitution, ill-guarded as it is, extended farther than it did in any country in the world. Treaties were to have more force here than in any part of Christendom; for he defied any gentleman to show any things so extensive in any strong, energetic government in Europe. Treaties rest, says he, on the laws and usages of nations. To say that they are municipal is, to me, a doctrine totally novel. To make them paramount to the Constitution and laws of the states, is unprecedented. . . . Gentlemen are going on in a fatal career; but I hope they will stop before they concede this power unguarded and unaltered."³²⁹

Randolph earlier, on June 13, had said of this power: "But it has been said that there is no restriction with respect to making treaties. The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition. The government ought to have power to provide for every contingency."³³⁰ Now Nicholas answered Henry as follows: "The worthy member says, that they can make a treaty relinquishing our rights, and inflicting punishments; because all treaties are declared paramount to the constitutions and laws of the states. An attentive consideration of this will show the committee that they can do no such thing. The provision of the 6th article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers. The treaties they make must be under the authority of the United States, to be within their province."³³¹ Mason, however, said he could find

³²⁸*Id.* at 449.

³²⁹*Id.* at 500.

³³⁰*Id.* at 363.

³³¹*Id.* at 507.

"nothing in that Constitution to hinder a dismemberment of the empire." As it stood, he thought "The President and Senate can make any treaty whatsoever. . . . We wish an express and explicit declaration, in that paper, that the power which can make other treaties cannot, without the consent of the national Parliament—the national legislature—dismember the empire. The Senate alone ought not to have this power; much less ought a few states to have it. No treaty to dismember the empire ought to be made without the consent of three fourths of the legislature in all its branches."³³²

The convention then took up Article III dealing with the judiciary. The attack here was of the same nature. "After having read the first section, Mr. Mason asked, What is here left to the state courts? Will any gentleman be pleased, candidly, fairly, and without sophistry, to show us what remains? There is no limitation. It goes to every thing. The inferior courts are to be as numerous as Congress may think proper. They are to be of whatever nature they please. Read the 2d section, and contemplate attentively the extent of the jurisdiction of these courts, and consider if there be any limits to it.

"I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts. If there be any limits, they must be contained in one of the clauses of this section; and I believe, on a dispassionate discussion, it will be found that there is none of any check. All the laws of the United States are paramount to the laws and constitution of any single state. 'The judicial power shall extend to all cases in law and equity arising under this Constitution.' What objects will not this expression extend to? Such laws may be formed as will go to every object of private property. When we consider the nature of these courts, we must conclude that their effect and operation will be utterly to destroy the state governments; for they will be the judges of how far their laws will operate. They are to modify their own courts, and you can make no state law to counteract them."³³³ "The principle itself goes to the destruction of the legislation of the states, whether or not it was intended. As to my opinion, I most religiously and conscientiously believe that it was intended, though I am not absolutely certain. But I think it will destroy the state governments, whatever may have been the intention. There are many gentlemen in the United States who think it right that we should have one great, national, consolidated government, and that it was better to bring it about slowly and imperceptibly rather than all at once. This is no reflection on any man, for I mean none. To those who think that one national, consolidated government is best for America, this extensive judicial authority will be agreeable; but I hope there are many in this

³³²*Id.* at 509.

³³³*Id.* at 521-22.

Convention of a different opinion, and who see their political happiness resting on their state governments.”³³⁴

On Friday Madison answered with a statement which clearly foreshadowed judicial review. “It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the United States.”³³⁵ The coextensiveness of judicial and legislative powers was recognized. “With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to.”³³⁶ Then, in direct response to Mason, “It was objected, that this jurisdiction would extend to all cases, and annihilate the state courts. At this moment of time, it might happen that there are many disputes between citizens of different states. But in the ordinary state of things, I believe that any gentleman will think that the far greater number of causes—ninety-nine out of a hundred—will remain with the state judiciaries. All controversies directly between citizen and citizen will still remain with the local courts. The number of cases within the jurisdiction of these courts is very small when compared to those in which the local tribunals will have cognizance.”³³⁷

Marshall also defended the judiciary as a necessary check on Congress in another anticipation of judicial review. “Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void. It will annihilate the state courts, says the honorable gentleman. Does not every gentleman here know that the causes in our courts are more numerous than they can decide, according to their present construction? Look at the dockets. You will find them crowded with suits, which the life of man will not see determined. If some of these suits be carried to other courts, will it be wrong? They will still have business enough.”³³⁸

On Saturday, June 21, Grayson was still unsatisfied. “With respect to the judiciary, my grand objection is, that it will interfere with the state judiciaries, in the same manner as the exercise of the power of direct taxation will interfere with the same power in the state govern-

³³⁴*Id.* at 522.

³³⁵*Id.* at 532.

³³⁶*Ibid.*

³³⁷*Id.* at 537-38.

³³⁸*Id.* at 553.

ments; there being no superintending central power to keep in order these two contending jurisdictions. This is an objection which is unanswerable in its nature."³³⁹ Referring to the Supreme Court, he said, "This court has more power than any court under heaven. One set of judges ought not to have this power—and judges, particularly, who have temptation always before their eyes."³⁴⁰ Continuing his criticism, he states: "My next objection to the *federal judiciary* is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and laws of the Union is of stupendous magnitude.

"It is impossible for human nature to trace its extent. It is so vaguely and indefinitely expressed, that its latitude cannot be ascertained."³⁴¹ "This high court has not a very extensive original jurisdiction. It is not material. But its appellate jurisdiction is of immense magnitude; and what has it in view, unless to subvert the state governments?"³⁴²

Randolph supported the judicial power. "Every government necessarily involves a judiciary as a constituent part. If, then, a federal judiciary be necessary, what are the characters of its powers? . . . Self-defence is its first object. Has not the Constitution said that the states shall not use such and such powers, and given exclusive powers to Congress? If the state judiciaries could make decisions conformable to the laws of their states, in derogation to the general government, I humbly apprehend that the federal government would soon be encroached upon. If a particular state should be at liberty, through its judiciary, to prevent or impede the operation of the general government, the latter must soon be undermined. It is, then, necessary that its jurisdiction should 'extend to all cases in law and equity arising under this Constitution and the laws of the United States.'"³⁴³ He was not, however, without doubts. "Although I do not concur with the honorable gentleman that the judiciary is so formidable, yet I candidly admit that there are defects in its construction, among which may be objected too great an extension of jurisdiction. I cannot say, by any means, that its jurisdiction is free from fault, though I conceive the subjects to be proper. It is ambiguous in some parts, and unnecessarily extensive in others. It extends to all cases in law and equity arising under the Constitution."³⁴⁴ "What do we mean by the words *arising under the Constitution*? What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word *arising* will be carried so far that it will be made use of to aid and extend the federal jurisdiction."³⁴⁵

³³⁹*Id.* at 563.

³⁴⁰*Id.* at 564.

³⁴¹*Id.* at 565.

³⁴²*Id.* at 567.

³⁴³*Id.* at 570.

³⁴⁴*Id.* at 571-72.

³⁴⁵*Id.* at 572.

On Monday of the fourth and final week Henry again took the initiative, singling out the Constitution's ambiguities for criticism. "The whole history of human nature cannot produce a government like that before you. The manner in which the judiciary and other branches of the government are formed, seems to me calculated to lay prostrate the states, and the liberties of the people. But, sir, another circumstance ought totally to reject that plan, in my opinion; which is, that it cannot be understood, in many parts, even by the supporters of it. A constitution, sir, ought to be, like a beacon, held up to the public eye, so as to be understood by every man."³⁴⁶ It was clear, however, that both sides had had their say.

On Tuesday, June 24, the committee of the whole having dissolved, Wythe "*proposed that the committee should ratify the Constitution, and that whatsoever amendments might be deemed necessary should be recommended to the consideration of the Congress which should first assemble under the Constitution, to be acted upon according to the mode prescribed therein.*"³⁴⁷ Henry then offered a counter proposal "to refer a declaration of rights, with certain amendments to the most exceptionable parts of the Constitution, to the other states in the confederacy, for their consideration, previous to its ratification."³⁴⁸ The issue was thus squarely posed between unconditional ratification with recommended amendments and conditional ratification with amendments a prerequisite. On Wednesday, by a vote of only 88 to 80, the convention voted that amendments should be recommendatory. Then, on the main question of ratification, the convention approved the Constitution, 89 to 79. The news from New Hampshire had not yet arrived, and for all the convention knew, its ratification was the ninth.

The ratification resolution read as follows: "We, the delegates of the people of Virginia, . . . Do, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, be resumed by them whensoever the same shall be perverted to their injury or oppression, and that every power, *not granted thereby, remains with them, and at their will*; that, therefore, no right, of any denomination, can be cancelled, abridged, restrained or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; . . . We, the said delegates, in the name and behalf of the people of Virginia, do, by these presents, *assent to and ratify the Constitution.*"³⁴⁹

³⁴⁶*Id.* at 579.

³⁴⁷*Id.* at 587.

³⁴⁸*Id.* at 593.

³⁴⁹*Id.* at 656.

Along with the ratification the convention approved a declaration or bill of rights of twenty sections and also twenty amendments which the state's representatives in the new Congress were to seek to obtain. The recommended amendments³⁵⁰ which are most germane to this study were as follows:

"1st. That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.

"3d. When the Congress shall lay direct taxes or excises, they shall immediately inform the executive power of each state, of the quota of such state, according to the census herein directed, which is proposed to be thereby raised; and if the legislature of any state shall pass a law which shall be effectual for raising such quota at the time required by Congress, the taxes and excises laid by Congress shall not be collected in such state.

"7th. That no commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate; . . .

"8th. That no navigation law, or law regulating commerce, shall be passed without the consent of two thirds of the members present, in both houses.

"11th. That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. . . .

"16th. That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.

"17th. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution."

RATIFICATION IN NEW YORK

The Constitution received the most intense opposition in New York. In no other state had the vote in the convention been as close, and nowhere else were the Federalists forced to make as many concessions in order to achieve ratification. The educational and propaganda campaigns on both sides had begun as soon as the Federal Convention finished its work. Some of the literature has already been examined. The New York legislature convened on January 9, 1788, and the oppo-

sition in the lower house sought to include in the resolution calling a convention a statement that the delegates to Philadelphia had exceeded their powers. This move was defeated by the bare margin of 27 to 25. In the senate a vote to postpone action lost by a vote of 10 to 9, and the concurrence with the lower house in calling a convention carried by only 11 to 8.

The spring elections for delegates gave the Anti-Federalists roughly a two-thirds majority of the sixty-five members of the convention which assembled on June 17, 1788. Leaders of the opposition were Governor Clinton, Melancthon, Smith, Lansing, Yates and Williams. The Federalist champion was, of course, Hamilton, assisted by Robert Livingston, chancellor of the state, and John Jay. The oratorical contest was principally between Smith and Hamilton. After the unanimous election of Clinton as president and the usual preliminaries, the convention went into committee of the whole and began its debates on June 19.

Livingston opened for the Federalists, and stated that not only were Americans possessed of a common language and religion, "they acknowledge the same great principles of government—a principle, if not unknown, at least little understood in the old world—that *all power is derived from the people*. They consider the state and the general governments as different deposits of that power. In this view, it is of little moment to them whether that portion of it which they must, for their own happiness, lodge in their rulers, be invested in the state governments only, or shared between them and the councils of the Union. The rights they reserve are not diminished, and probably their liberty acquires an additional security from the division."³⁵¹ He said that "the old Confederation was defective in its principle, and impeachable in its execution, as it operated upon states in their political capacity, and not upon individuals; . . . that this idea of a federal republic, on the ground of a league among independent states, had, in every instance, disappointed the expectations of its advocates."³⁵² The powers "of forming laws . . . of deciding upon these laws, and carrying them into effect; that this power could never be trusted to the individual states, whose interests might, in many instances, clash with that of the Union."³⁵³ He concluded that "if we could not longer retain the old principle of the confederacy, and were compelled to change its form, we were driven to the necessity of creating a new constitution."³⁵⁴

The next day Smith arose for his first speech in opposition. "The defects of the old Confederation needed as little proof as the necessity of a

³⁵⁰*Id.* at 659-61.

³⁵¹2 ELLIOT'S DEBATES, *op. cit.* *supra* note 260, at 210.

³⁵²*Id.* at 214.

³⁵³*Id.* at 214-15.

³⁵⁴*Id.* at 215.

union. But there was no proof in all this that the proposed Constitution was a good one. Defective as the old Constitution is, he said, no one could deny but it was possible we might have a worse government. But the question was not whether the present Constitution be a bad one, but whether the proposed Constitution be a good one."³⁵⁵ Interpreting Livingston's remarks to his own convenience, he said that "He was pleased that, thus early in debate, the honorable gentleman had himself shown that the intent of the Constitution was not a confederacy, but a reduction of all the states into a consolidated government. He hoped the gentleman would be complaisant enough to exchange names with those who disliked the Constitution, as it appeared from his own concessions, that they were federalists, and those who advocated it were anti-federalists."³⁵⁶ Then, giving his own reason for being opposed to the Constitution, "He considers that the great interests and liberties of the people could only be secured by the state governments. He admitted that, if the new government was only confined to great national objects, it would be less exceptionable; but it extended to every thing dear to human nature. That this was the case, would be proved without any long chain of reasoning; for that power which had both the purse and the sword had the government of the whole country, and might extend its powers to any and to every object."³⁵⁷

Now Hamilton entered the argument. "We contend that the radical vice in the old Confederation is, that the laws of the Union apply only to states in their corporate capacity."³⁵⁸ He then illustrated the weakness by reference to requisitions. "In this examination, not being furnished with those lights which directed the deliberations of the general government, and incapable of embracing the general interests of the Union, the states have almost uniformly weighed the requisitions by their own local interests, and have only executed them so far as answered their particular convenience or advantage. Hence there have ever been thirteen different bodies to judge of the measures of Congress, and the operations of government have been distracted by their taking different courses. Those which were to be benefited have complied with the requisitions; others have totally disregarded them. . . . Sir, if we have national objects to pursue, we must have national revenues. If you make requisitions, and they are not complied with, what is to be done? It has been observed, to coerce the states is one of the maddest projects that was ever devised. . . . Then we are brought to this dilemma—either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national

³⁵⁵*Id.* at 223-24.

³⁵⁶*Id.* at 224.

³⁵⁷*Id.* at 228.

³⁵⁸*Id.* at 231.

laws to operate on individuals, in the same manner as those of the states do. This is the true reasoning upon the subject, sir. The gentlemen appear to acknowledge its force; and yet, while they yield to the principle, they seem to fear its application to the government."³⁵⁹

The next day Smith returned to the attack. "A few years ago, we fought for liberty; we framed a general government on free principles; we placed the state legislatures, in whom the people have a full and a fair representation, between Congress and the people. We were then, it is true, too cautious, and too much restricted the powers of the general government. But now it is proposed to go into the contrary, and a more dangerous extreme—to remove all barriers, to give the new government free access to our pockets, and ample command of our persons, and that without providing for a genuine and fair representation of the people. No one can say what the progress of the change of sentiment may be in twenty-five years. The same men who now cry up the necessity of an energetic government, to induce a compliance with this system, may, in much less time, reprobate this in as severe terms as they now do the Confederation, and may as strongly urge the necessity of going as far beyond this as this is beyond the Confederation. Men of this class are increasing: they have influence, talents, and industry. It is time to form a barrier against them. And while we are willing to establish a government adequate to the purposes of the Union, let us be careful to establish it on the broad basis of equal liberty."³⁶⁰

Hamilton then sought to demonstrate that the Constitution provided ample checks on any possible abuse of national powers. "Besides, the President of the United States will be himself the representative of the people. From the competition that ever subsists between the branches of government, the President will be induced to protect their rights, whenever they are invaded by either branch. On whatever side we view this subject, we discover various and powerful checks to the encroachments of Congress. The true and permanent interests of the members are opposed to corruption. Their number is vastly too large for easy combination. The rivalry between the houses will forever prove an insuperable obstacle. The people have an obvious and powerful protection in their state governments. Should any thing dangerous be attempted, these bodies of perpetual observation will be capable of forming and conducting plans of regular opposition. Can we suppose the people's love of liberty will not, under the incitement of their legislative leaders, be roused into resistance, and the madness of tyranny be extinguished at a blow? Sir, the danger is too distant; it is beyond all rational calculations. . . . Where this principle [popular elections] is adhered to;

³⁵⁹*Id.* at 231-34.

³⁶⁰*Id.* at 250-51.

where, in the organization of the government, the legislative, executive, and judicial branches are rendered distinct; where, again, the legislature is divided into separate houses, and the operations of each are controlled by various checks and balances, and, above all, by the vigilance and weight of the state governments,—to talk of tyranny, and the subversions of our liberties, is to speak the language of enthusiasm. This balance between the national and state governments ought to be dwelt on with peculiar attention, as it is of the utmost importance. It forms a double security to the people. If one encroaches on their rights, they will find a powerful protection in the other. Indeed, they will both be prevented from overpassing their constitutional limits, by a certain rivalry, which will ever subsist between them. I am persuaded that a firm union is as necessary to perpetuate our liberties as it is to make us respectable; and experience will probably prove that the national government will be as natural a guardian of our freedom as the state legislatures themselves.”³⁶¹

But Smith was unconvinced. “The honorable member had assured the committee that the states would be checks upon the general government, and had pledged himself to point out and demonstrate the operation of these checks. For his own part, he could see no possibility of checking a government of independent powers, which extended to all objects and resources without limitation. What he lamented was, that no constitutional checks were provided—such checks as would not leave the exercise of government to the operation of causes which, in their nature, are variable and uncertain.”³⁶²

Hamilton sought to explain how state interests and state power could operate as checks upon the national government. “Sir, in my experience of public affairs, I have constantly remarked, in the conduct of members of Congress, a strong and uniform attachment to the interests of their own state. These interests have, on many occasions, been adhered to with an undue and illiberal pertinacity, and have too often been preferred to the welfare of the Union. This attachment has given birth to an unaccommodating spirit of party, which has frequently embarrassed the best measures. It is by no means, however, an object of surprise. The early connections we have formed, the habits and prejudices in which we have been bred, fix our affections so strongly, that no future objects of association can easily eradicate them. This, together with the entire and immediate dependence the representative feels on his constituent, will generally incline him to prefer the particular before the public good. . . . Sir, the most powerful obstacle to the members of Congress betraying the interest of their constituents, is the state legislatures themselves, who will be standing bodies of observation, possess-

³⁶¹*Id.* at 253-58.

³⁶²*Id.* at 259.

ing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essays of treachery. They will institute regular modes of inquiry. The complicated domestic attachments, which subsist between the state legislators and their electors, will ever make them vigilant guardians of the people's rights. Possessed of the means and the disposition of resistance, the spirit of opposition will be easily communicated to the people, and, under the conduct of an organized body of leaders, will act with weight and system. Thus it appears that the very structure of the confederacy affords the surest preventives from error, and the most powerful checks to misconduct."³⁶³ Thus ended the first week.

The next week Lansing criticized the failure of the Constitution to recognize, comparably to the Articles, any state power of recall over its Senators. "I believe it was undoubtedly the intention of the framers of this Constitution to make the lower house the proper, peculiar representative of the interests of the people; the Senate, of the sovereignty of the states. . . . Now, if it was the design of the plan to make the Senate a kind of bulwark to the independence of the states, and a check to the encroachments of the general government, certainly the members of this body ought to be peculiarly under the control, and in strict subordination to the state who delegated them. In proportion to their want of dependence, they will lose their respect for the power from whom they receive their existence, and, consequently, will disregard the great object for which they are instituted. . . . No inconvenience can follow from placing the powers of the Senate on such a foundation as to make them feel their dependence. It is only a check calculated to make them more attentive to the objects for which they were appointed. . . . It is the only thing which can give the states a control over the Senate."³⁶⁴

Chancellor Livingston replied to Lansing. "The Senate are indeed designed to represent the state governments; but they are also the representatives of the United States, and are not to consult the interest of any one state alone, but that of the Union. This could never be done, if there was a power of recall; for sometimes it happens that small sacrifices are absolutely indispensable for the good and safety of the confederacy; but, if a senator should presume to consent to these sacrifices, he would be immediately recalled. This reasoning turns on the idea that a state, not being able to comprehend the interest of the whole, would, in all instances, adhere to her own, even to the hazard of the Union. . . . The general government may find it necessary to do many things which some states might never be willing to consent to. . . . There are a thousand things which an honest man might be obliged to do, from a conviction

³⁶³*Id.* at 266-67.

³⁶⁴*Id.* at 289-90.

that it would be for the general good, which would give great dissatisfaction to his constituents.”³⁶⁵

Lansing persisted. “I wish gentlemen would uniformly adhere to the distinction between the grand design of the House of Representatives and that of the Senate. Does not one represent the individuals, the people of a state, and the other its collective sovereignty?”³⁶⁶ So Livingston amplified his reply. “He believed that the power of recall would have a tendency to bind the senators too strongly to the interests of their respective states; and for that reason he objected to it. It will destroy, said he, that spirit of independence and free deliberation which ought to influence the senator. Whenever the interests of a state clash with those of the Union, it will oblige him to sacrifice the great objects of his appointment to local attachments. He will be subjected to all the caprices, the parties, the narrow views, and illiberal politics, of the state governments, and become a slave to the ambitions and factions at home.

“These observations, continued the chancellor, are obvious inferences from a principle which has been already explained—that the state legislatures will be ever more or less incapable of comprehending the interests of the Union. They cannot perceive the propriety, or feel the necessity, of certain great expedients in politics, which may seem, in their immediate operation, to injure the private interests of the members.”³⁶⁷

Hamilton also spoke in opposition to Lansing’s advocacy of a state power of recall. “The local interests of a state ought in every case, to give way to the interests of the Union; for when a sacrifice of one or the other is necessary, the former becomes only an apparent partial interest, and should yield, on the principle that the small good ought never to oppose the great one. When you assemble from your several counties in the legislature, were every member to be guided only by the apparent interest of his county, government would be impracticable. There must be a perpetual accommodation and sacrifice of local advantage to general expediency; but the spirit of a mere popular assembly would rarely be actuated by this important principle. It is therefore absolutely necessary that the Senate should be so formed as to be unbiased by false conceptions of the real interests or undue attachment to the apparent good of their several states.”³⁶⁸

“The objectors do not advert to the natural strength and resources of state governments, which will ever give them an important superiority over the general government. If we compare the nature of their different

³⁶⁵*Id.* at 291-92.

³⁶⁶*Id.* at 294.

³⁶⁷*Id.* at 296.

³⁶⁸*Id.* at 303.

powers, or the means of popular influence which each possesses, we shall find the advantage entirely on the side of the states."³⁶⁹

The real danger, in fact, to Hamilton was just the opposite. "From the circumstances already explained, and many others which might be mentioned, results a complicated, irresistible check, which must ever support the existence and importance of the state governments. The danger, if any exists, flows from an opposite source. The probable evil is, that the general government will be too dependent on the state legislatures, too much governed by their prejudices, and too obsequious to their humors; that the states, with every power in their hands, will make encroachments on the national authority, till the Union is weakened and dissolved."³⁷⁰

But Lansing thought the realities pointed to the other conclusion. "The states, having no constitutional control, would soon be found unnecessary and useless, and would be gradually extinguished."³⁷¹ He asked: ". . . were the states arrayed in all the powers of sovereignty? Could they maintain armies? Had they the unlimited power of taxation? There was no comparison, he said, between the powers of the two governments. The circumstances the gentleman had enumerated, which seemed to be in favor of the states, only proved that the people would be under some advantages to discern the encroachments of *Congress*, and to take the alarm; but what would this signify? The gentleman did not mean that his principles should encourage rebellion: what other resources had they? None, but to wait patiently till the long terms of their senators were expired, and then elect other men. All the boasted advantages enjoyed by the states were finally reduced to this. The gentleman had spoken of an enmity which would subsist between the general and state governments: what, then would be the situation of both? His wish, he said, was to prevent any enmity, by giving the states a constitutional and peaceable mode of checking maladministration, by recalling their senators, and not driving them into hostilities, in order to obtain redress."³⁷²

Debate continued, nevertheless, on the recall. Smith supported Lansing. "I would observe, that, as the senators are the representatives of the *state legislatures*, it is reasonable and proper that they should be under their control. When a state sends an agent commissioned to transact any business, or perform any service, it certainly ought to have a power to recall."³⁷³ This, in direct reply to Hamilton, Smith said: "It is further observed, that it would be improper to give the legislatures

³⁷³*Id.* at 311.

³⁶⁹*Id.* at 304.

³⁷⁰*Id.* at 304-05.

³⁷¹*Id.* at 308.

³⁷²*Id.* at 308-09.

this power, because the local interests and prejudices ought not to be admitted into the general government; and that, if the senator is rendered too dependent on his constituents, he will sacrifice the interests of the Union to the policy of his state. Sir, the Senate has been generally held up, by all parties, as a safeguard to the rights of the several states. In this view, the closest connection between them has been considered as necessary. But now, it seems, we speak in a different language; we now look upon the least attachment to their states as dangerous; we are now for separating them, and rendering them entirely independent, that we may root out the last vestige of state sovereignty."³⁷⁴

Hamilton then distinguished state rights from state interests. "It has been remarked, that there is an inconsistency in our admitting that the *equal vote in the Senate* was given to secure the rights of the states, and at the same time holding up the idea that their interests should be sacrificed to those of the Union. But the committee certainly perceive the distinction between the rights of a state and its interests. The rights of a state are defined by the Constitution, and cannot be invaded without a violation of it; but the interests of a state have no connection with the Constitution, and may be, in a thousand instances, constitutionally sacrificed. A uniform tax is perfectly constitutional; and yet it may operate oppressively upon certain members of the Union. The gentlemen are afraid that the state governments will be abolished. But, sir, their existence does not depend upon the laws of the United States. Congress can no more abolish the state governments, than they can dissolve the Union. The whole Constitution is repugnant to it, and yet the gentlemen would introduce an additional useless provision against it. It is proper that the influence of the states should prevail to a certain extent. But shall the individual states be the judges how far? Shall an unlimited power be left them to determine in their own favor? The gentlemen go into the extreme. . . . As far as my observation has extended, factions in Congress have arisen from attachment to *state prejudices*. We are attempting, by this Constitution, to abolish factions, and to unite all parties for the general welfare. That a man should have the power, in private life, of recalling his agent, is proper; because, in the business in which he is engaged, he has no other object but to gain the approbation of his principal. Is this the case with the senator? Is he simply the agent of the state? No. He is an agent for the Union, and he is bound to perform services necessary to the good of the whole, though his state should condemn them."³⁷⁵

On Tuesday, June 24, the momentous word arrived from New Hampshire—by express rider previously arranged by Hamilton—that her convention had ratified, thus putting the Constitution in operation.

³⁷⁴*Id.* at 312.

³⁷⁵*Id.* at 319-20.

The next day Livingston pointedly "observed, that it would not, perhaps, be altogether impertinent to remind the committee, that, since the intelligence of yesterday, it had become evident that the circumstances of the country were greatly altered, and the ground of the present debate changed."³⁷⁶ Smith, however, said that "With respect to the change of circumstances which had such a solemn effect upon the honorable gentleman, he confessed it had not altered his feelings or wishes on the subject."³⁷⁷ And Lansing said that "It is true, we have received information that the *ninth state has ratified the Constitution*; but I contend that no such event ought to influence our deliberations."³⁷⁸ Despite such brave resolves, the news of New Hampshire's action dealt the opposition a blow. Refusal to ratify now meant that New York would be left out of the new nation.

On Thursday, Williams spoke against the plenitude of Congressional power. "In the preamble, the intent of the Constitution, among other things, is declared to be, 'provide for the common defence, and promote the general welfare;' and in the clause under consideration, the power is in express words given to Congress 'to provide for the common defence and general welfare.' And in the last paragraph of the same section, there is an express authority to make all laws which shall be necessary and proper for the carrying into execution this power. It is therefore evident that the legislature, under this Constitution, may pass any law which they may think proper. It is true, the 9th section restrains their power with respect to certain objects. But these restrictions are very limited, some of them improper, some unimportant, and others not easily understood."³⁷⁹ Specifically referring to the necessary and proper power, he said, "It is perhaps utterly impossible fully to define this power. . . . A case cannot be conceived which is not included in this power."³⁸⁰ And on the taxing power, "Every source of revenue is therefore committed to the hands of the general legislature. Not only these terms are very comprehensive, and extend to a vast number of objects, but the power to lay and collect has great latitude: it will lead to the passing of a vast number of laws, which may affect the personal rights of the citizens of the states, and put their lives in jeopardy. . . . The command of the revenues of a state gives the command of every thing in it. He that hath the purse will have the sword; and they that have both have every thing; so that Congress will have every source from which money can be drawn."³⁸¹

³⁷⁶*Id.* at 322.

³⁷⁷*Id.* at 324.

³⁷⁸*Id.* at 324-25.

³⁷⁹*Id.* at 330.

³⁸⁰*Id.* at 331.

³⁸¹*Id.* at 330-31.

On Friday, Smith addressed himself to the powers of Congress. "It is necessary that the powers vested in government should be precisely defined, that the people may be able to know whether it moves in the circle of the Constitution. It is the more necessary in governments like the one under examination, because Congress here is to be considered as only a part of a complex system. The *state governments* are necessary for certain local purposes; the *general government* for national purposes. The latter ought to rest on the former, not only in its form, but in its operations. It is therefore of the highest importance that the line of jurisdiction should be accurately drawn"³⁸²

Referring specifically to the taxing power, Smith declared: "By this clause unlimited powers in taxation are given. Another clause declares that Congress shall have power to make all laws necessary to carry the Constitution into effect. Nothing, therefore, is left to *construction*; but the powers are most express. How far the state legislatures will be able to command a revenue, every man, on viewing the subject, can determine. If he contemplates the ordinary operation of causes, he will be convinced that the powers of the confederacy will swallow up those of the members. I do not suppose that this effect will be brought about suddenly. As long as the people feel universally and strongly attached to the state governments, Congress will not be able to accomplish it. If they act prudently, their powers will operate and be increased by degrees. . . . If the Constitution is accepted as it stands, I am convinced that in seven years as much will be said against the state governments as is now said in favor of the proposed system."³⁸³

In Smith's judgment, the powers granted the national government were altogether too great. "We all agree that a general government is necessary; but it ought not to go so far as to destroy the authority of the members. We shall be unwise to make a new experiment, in so important a matter, without some known and sure grounds to go upon. The state constitutions should be the guardians of our domestic rights and interests, and should be both the support and the check of the federal government. . . . The idea that Congress ought to have *unlimited powers* is entirely novel. I never heard it till the meeting of this Convention. The general government once called on the states to invest them with the command of funds adequate to the exigencies of the Union; but they did not ask to command all the resources of the states. They did not wish to have a control over all the property of the people. If we now give them this control, we may as well give up the state governments with it. I have no notion of setting the two powers at variance; nor would I give a farthing for a government which could not command a farthing. On the whole, it appears to me probable,

³⁸²*Id.* at 332.

³⁸³*Id.* at 334.

that, unless some certain specific source of *revenue* is reserved to the states, their governments, with their independency, will be totally annihilated.”³⁸⁴

Williams now added to his remarks of the previous day. “Sir, I yesterday expressed my fears that this clause would tend to annihilate the state governments. I also observed, that the powers granted by it were indefinite, since the Congress are authorized to provide for the common defence and general welfare, and to pass all laws necessary for the attainment of those important objects. The legislature is the highest power in a government. Whatever they judge necessary for the proper administration of the powers lodged in them, they may execute without any check or impediment. Now, if the Congress should judge it a proper provision, for the common defence and general welfare, that the state governments should be essentially destroyed, what, in the name of common sense, will prevent them? Are they not constitutionally authorized to pass such laws? Are not the terms, *common defence and general welfare*, indefinite, undefinable terms? What checks have the state governments against such encroachments? Why, they appoint the senators once in six years.”³⁸⁵

Williams also feared the consequences of interpretation. “Ingenious men may assign ingenious reasons for opposite constructions of the same clause. They may heap refinement upon refinement, and subtilty upon subtilty, until they construe away every republican principle, every right sacred and dear to man . . . I would wish that little or no latitude might be left to the sophistical constructions of men who may be interested in betraying the rights of the people. . . . If we adopt this Constitution, it is impossible, absolutely impossible, to know what we give up, and what we retain.”³⁸⁶

Hamilton then addressed himself to the question of national and state power. “The question, then, of the *division of powers* between the general and state governments, is a question of convenience; it becomes a prudential inquiry, what powers are proper to be reserved to the latter; and this immediately involves another inquiry into the proper objects of the two governments. This is the criterion by which we shall determine the just distribution of powers.

“The great leading objects of the federal government, in which revenue is concerned, are to maintain domestic peace, and provide for the common defence. In these are comprehended the regulation of commerce,—that is, the whole system of foreign intercourse,—the support of armies and navies, and of the civil administration. It is useless to go into detail. Every one knows that the objects of the general government

³⁸⁴*Id.* at 335-37.

³⁸⁵*Id.* at 338.

³⁸⁶*Id.* at 338-39.

are numerous, extensive, and important. Every one must acknowledge the necessity of giving powers, in all respects, and in every degree, equal to these objects. This principle assented to, let us inquire what are the objects of the state governments. Have they to provide against foreign invasion? Have they to maintain fleets and armies? Have they any concern in the regulation of commerce, the procuring alliances, or forming treaties of peace? No. Their objects are merely civil and domestic—to support the legislative establishment, and to provide for the administration of the laws.”³⁸⁷ Then he asked: “Now, sir, where ought the great resources to be lodged? Every rational man will give an immediate answer. To what extent shall those resources be possessed? Reason says, As far as possible exigencies can require; that is, without limitation. A constitution cannot set bounds to a nation’s wants; it ought not, therefore, to set bounds to its resources.”³⁸⁸

He still maintained that national power posed no undue threat to the states. “If the state governments were to be abolished, the question would wear a different face; but this idea is inadmissible. They are absolutely necessary to the system. Their existence must form a leading principle in the most perfect constitution we could form.

“I insist that it never can be the interest or desire of the national legislature to destroy the *state governments*. It can derive no advantage from such an event; but, on the contrary, would lose an indispensable support, a necessary aid in executing the laws, and conveying the influence of government to the doors of the people. The Union is dependent on the will of the state governments for its chief magistrate, and for its Senate. The blow aimed at the members must give a fatal wound to the head; and the destruction of the states must be at once a political suicide. Can the national government be guilty of this madness?”³⁸⁹

The next day Lansing emphatically disagreed with Hamilton on the latter point. “Sir, if you do not give the state governments a power to protect themselves, if you leave them no other check upon Congress than the power of appointing senators, they will certainly be overcome. . . . Neither our civil nor militia officers will afford many advantages of opposition against the national government: if they have any powers, it will ever be difficult to concentrate them, or give them a uniform direction. Their influence will hardly be felt, while the greater number of lucrative and honorable places, in the gift of the United States, will establish an influence which will prevail in every part of the continent.”³⁹⁰ Lansing then accused Hamilton, while at the Federal Convention, of having “argued, with much decision and great plausibility

³⁹⁰*Id.* at 375-76.

³⁸⁷*Id.* at 350.

³⁸⁸*Id.* at 351.

³⁸⁹*Id.* at 353.

that the state governments ought to be subverted, at least so far as to leave them only corporate rights, and that, even in that situation, they would endanger the existence of the general government."³⁹¹ The records state that "This produced a warm personal altercation between those gentlemen, which engrossed the remainder of the day."³⁹² So ended the second week.

The following Tuesday Smith again discussed the question of the national powers. "He said that, from general reasoning, it must be inferred that, if the objects of the general government were without limitation, there could be no bounds set to their powers; that they had a right to seek those objects by all necessary laws, and by controlling every subordinate power. The means should be adequate to the end: the less should give way to the greater. General principles, therefore, clearly led to the conclusion, that the general government must have the most complete control over every power which could create the least obstacle to its operations.

"Mr. Smith then went into an examination of the particular provisions of the Constitution, and compared them together, to prove that his remarks were not conclusions from general principles alone, but warranted by the language of the Constitution. He conceived, therefore, that the national government would have powers, on this plan, not only to lay all species of taxes, but to control and set aside every thing which should impede the collection of them. They would have power to abrogate the laws of the states, and to prevent the operation of their taxes; and all courts, before whom any disputes on these points should come, whether federal or not, would be bound by oath to give judgment according to the laws of the Union."³⁹³

Jay answered Smith. "He began with a description of the general characteristics of a government proper for the United States. It had, he said, been justly laid down, that a government which was to accomplish national purposes should command the national resources. Here a question had been raised. Would it be proper that the state governments should limit the powers of the general government, relative to its supplies? Would it be right or politic that the sovereign power of a nation should depend for support on the mere will of the several members of that nation? that the interest of a part should take place of that of the whole, or that the partial views of one of the members should interfere with and defeat the views of all? He said that, after the most mature reflection, he could see no possible impropriety in the general government having access to all the resources of the country."³⁹⁴

³⁹¹*Id.* at 376.

³⁹²*Id.* at 370.

³⁹³*Id.* at 377-78.

³⁹⁴*Id.* at 380.

On Wednesday, July 5, the final recorded blast against the Constitution was made by a delegate named Tredwell who had not spoken prior to this time. He first stated his disagreement with the rule of construction advanced by the Federalists, namely, that powers not delegated to the national government were reserved to the states. "Sir, I introduce these observations to combat certain principles which have been daily and confidently advanced by the favorers of the present Constitution, and which appear to me totally indefensible. The first and grand leading, or rather misleading, principle in this debate, and on which the advocates for this system of unrestricted powers must chiefly depend for its support, is that, in forming a constitution, whatever powers are not expressly granted or given the government, are reserved to the people, or that rulers cannot exercise any powers but those expressly given to them by the Constitution."³⁹⁵ He said the public bodies in the United States "have uniformly acted upon a direct and contrary principle, not only in forming the state constitutions and the old Confederation, but also in forming this very Constitution, for we do not find in every state constitution express resolutions made in favor of the people; and it is clear that the late Convention at Philadelphia, whatever might have been the sentiments of some of its members, but did adopt the principle, for they have made certain reservations and restrictions, which, upon that principle, would have been totally useless and unnecessary. . . ."³⁹⁶

Tredwell then summarized his fears that the Constitution provided for a consolidated government under which state sovereignty would no longer exist. "In this Constitution, sir, we have departed widely from the principles and political faith of '76, when the spirit of liberty ran high, and danger put a curb on ambition. Here we find no security for the rights of individuals, no security for the existence of our state governments; here is no bill of rights, no proper restriction of power; our lives, our property, and our consciences, are left wholly at the mercy of the legislatures, and the powers of the judiciary may be extended to any degree short of almighty. . . . We are told that this is a federal government. I think, sir, there is as much propriety in the name, as in that which its advocates assume, and no more; it is, in my idea, as complete a consolidation as the government of this state, in which legislative powers, to a certain extent, are exercised by the several towns and corporations. The sole difference between a state government under this Constitution, and a corporation under a state government, is, that a state being more extensive than a town, its powers are likewise proportionately extended, but neither of them enjoys the least share of sovereignty; for, let me ask, what is a state government? What sovereignty, what power is left

³⁹⁵*Id.* at 398.

³⁹⁶*Ibid.*

to it, when the control of every source of revenue, and the total command of the militia, are given to the general government? That power which can command both the property and the persons of the community, is the sovereign, and the sole sovereign. The idea of two distinct sovereigns in the same country, separately *possessed* of sovereign and supreme power, in the same matters at the same time, is as supreme an absurdity, as that two distinct separate circles can be bounded exactly by the same circumference. This, sir, is demonstration; and from it I draw one corollary, which, I think, clearly follows, although it is in favor of the Constitution, to wit—that at least that clause in which Congress guarantees to the several states a republican *form* of government, speaks honestly; that is, that no more is intended by it than is expressed; and I think it is clear that, whilst the mere form is secured, the substance—to wit, the whole power and sovereignty of our state governments, and with them the liberties of the country—is swallowed up by the general government; for it is well worth observing, that, while our state governments are held up to us as the great and sufficient security of our rights and privileges, it is carefully provided that they shall be disarmed of all power, and made totally dependent on the bounty of Congress for their support, and consequently for their existence,—so that we have scarce a single right secured under either . . . This government is founded in sin, and reared up in iniquity; the foundations are laid in a most sinful breach of public trust, and the top-stone is a most iniquitous breach of public faith; and I fear, if it goes into operation, we shall be justly punished with the total extinction of our civil liberties.”³⁹⁷

At this point the recorded discussion ends. The next day, July 6, word arrived that the Virginia convention had unconditionally ratified. This news had a powerful effect upon many of the anti-Federalists, including Smith, for the only remaining states were North Carolina and Rhode Island. Indeed, from this moment on the question seems to have become whether or not the ratification should be conditional or unconditional. On July 10 Lansing introduced a series of amendments. Some were explanatory, some were recommendatory, and some were conditions precedent to ratification. These were referred to a committee, which deadlocked over the word “conditional” and dissolved without reporting.

The next day Jay moved to ratify the Constitution together with certain explanations and such recommended amendments as the convention might deem “useful or expedient.” This motion led to protracted debate. On July 15 Smith moved to amend Jay’s motion so that the ratification would be “upon condition” that Congress should not exercise certain powers within New York until a second convention should be called to propose amendments to the Constitution. The next day, July 16, a motion to adjourn was defeated, as also was a motion

³⁹⁷*Id.* at 401-05.

by Duane to postpone Smith's amendment in favor of Jay's original motion. Debate resumed on Smith's amendment.

On Saturday, July 19, Lansing moved to postpone all pending motions in order to again consider a conditional ratification, and this motion carried. Very much alarmed, Hamilton wrote quickly to Madison, who had now returned to New York as a member of Congress. Madison replied immediately, and the next week Hamilton read Madison's letter to the convention. "My opinion is," Madison wrote, "that a reservation of a right to withdraw, if amendments be not decided on under the form of the constitution within a certain time, is a *conditional* ratification; that it does not make New York a member of the new union, and, consequently, that she could not be received on that plan. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other states. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any *condition* whatever must vitiate the ratification. The idea of reserving a right to withdraw was started at Richmond, and considered as a conditional ratification, which was itself abandoned as worse than a rejection."³⁹⁸

Madison's letter had the desired effect. On July 23 Smith supported an amendment which changed the words "upon condition" in the ratification to "in full confidence." The same day the convention defeated a motion by Lansing that "there should be reserved to the state of New York a right to withdraw herself *from the Union* after a certain number of years, unless the amendments proposed should previously be submitted to a general convention."³⁹⁹ The convention then for two days considered the many amendments which should be recommended. As a further price for ratification, it was agreed that a circular letter should be prepared for transmittal to the other state legislatures, urging a second general convention to propose amendments.

The concessions made in order to win ratification were therefore fourfold. First, the form of ratification began with twenty-three declarations of understanding or explanations of the Constitution, mainly dealing with matters of individual liberty. The following are germane to this study:

"That the powers of government may be reassumed by the people, whenever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments to whom they may have granted the

³⁹⁸BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 346 (5th ed. 1885).

³⁹⁹2 ELLIOT'S DEBATES, *op. cit. supra* note 260, at 412.

same; and that those clauses in the said Constitution, which declare, that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution. . . ."⁴⁰⁰

"That the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, is not in any case to be increased, enlarged, or extended by any fiction, collusion, or mere suggestion;—and that no treaty is to be construed so to operate as to alter the constitution of any state."⁴⁰¹

The ratification resolution continued: "Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration," the convention then ratified "in the name and in the behalf of the people of the state of New York."⁴⁰²

Then followed the second concession to the opposition. The ratification was declared to be "In full confidence nevertheless that until a convention shall be called and convened for proposing amendments to the said Constitution,"⁴⁰³ the following things should not take place: the state militia should not be continued out of the state longer than six weeks without the consent of the state legislature; Congress should not exercise its power to make or alter election regulations in New York unless the state should refuse or neglect to make such regulations; and Congress should lay no direct taxes within the state without first making a requisition upon the state which the legislature should have an opportunity to satisfy.

The third concession was a series of thirty-two recommended amendments which the state's representatives in Congress were enjoined to promote. One would have curbed Congress's taxing power by requiring resort to the requisition system first; one would have conditioned Congress's power over elections upon the neglect or refusal of the states to provide the necessary regulations; others would have required two-thirds majorities for the exercise of Congressional power to raise armies, declare war, and borrow money; one would have confined inferior federal courts to admiralty and maritime cases, leaving original jurisdiction in all other cases to the state courts.

The final concession was the circular letter to the various state

⁴⁰⁰DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1035 (Tansill ed. 1927).

⁴⁰¹*Id.* at 1037.

⁴⁰²*Id.* at 1037-38.

⁴⁰³*Id.* at 1038.

legislatures. This letter, which urged the other states to join in a move to call a second convention to propose amendments to the Constitution, said in part: "Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest confidence of obtaining a revision of them by a general convention, and an invincible reluctance to separating from our sister states, could have prevailed upon a sufficient number to ratify it, without stipulating for previous amendments."⁴⁰⁴

The depth and intensity of the opposition to the Constitution in New York is revealed by the fact that, with all the foregoing concessions and with the knowledge that New Hampshire and Virginia had ratified, the convention approved the Constitution by a vote of only 30 to 27. On the crucial vote, Smith voted to ratify.

THE FINAL RATIFICATIONS

The legislature of North Carolina in December 1787, authorized an election to be held in March 1788, for delegates to a state convention to consider the Constitution. On July 21, 1788, the two hundred and twenty-eight delegates assembled at Hillsboro. The outstanding Federalist leaders were James Iredell, later appointed to the Supreme Court by Washington; William R. Davie and Richard Dobbs Spaight, who had been delegates to the Federal Convention; Samuel Johnston, the governor; and Archibald Maclaine, a prominent lawyer. The opposition was firmly in the grip of Willie Jones, who had declined an appointment as delegate to the Federal Convention and who now participated but little in the debates; David Caldwell, Timothy Bloodworth and Samuel Spencer.

As elsewhere, although the Federalists were superior in intellect and ability, they were in the minority, being outnumbered by the anti-Federalists by slightly more than two to one. After the preliminaries were over, Jones on Wednesday, July 23, put the Federalists in great alarm by moving that the question be immediately put. The Federalists' only hope lay in delay, and after spirited remarks by Iredell and others, it was decided to sit as a committee of the whole and discuss the provisions of the Constitution in order. The situation was just opposite from that in Maryland. Being confident of their majority, the anti-Federalists frequently refused to enter into the debates, although solicited to do so. More than once the Federalists raised the opposition arguments for the purpose of rebutting them.

The debates opened on Thursday with an objection by Caldwell to the preamble. "Mr. Chairman, if they mean, *We, the people*,—the people at large,—I conceive the expression is improper. Were not they who framed this Constitution the representatives of the legislatures of the

⁴⁰⁴2 ELLIOT'S DEBATES, *op. cit. supra* note 260, at 413-14.

different states? In my opinion, they had no power, from the people at large, to use their name, or to act for them. They were not delegated for that purpose."⁴⁰⁵ Maclaine replied that "The sanction of the state legislatures was in some degree necessary. It was to be submitted by the legislatures to the people; so that, when it is adopted, it is the act of the people. When it is the act of the people, their name is certainly proper."⁴⁰⁶

Davie then discussed at length the inadequacies of the Articles and how they would be cured by the Constitution. "The Confederation derived its sole support from the state legislatures. This rendered it weak and ineffectual. It was therefore necessary that the foundations of this government should be laid on the broad basis of the people. Yet the state governments are the pillars upon which this government is extended over such an immense territory, and are essential to its existence. The House of Representatives are immediately elected by the people. The senators represent the sovereignty of the states; they are directly chosen by the state legislatures, and no legislative act can be done without their concurrence. . . . Another radical vice in the old system, which was necessary to be corrected, and which will be understood without a long deduction of reasoning, was, that it legislated on states, instead of individuals; and that its powers could not be executed but by fire or by the sword—by military force, and not by the intervention of the civil magistrate. . . . It was therefore absolutely necessary that the influence of the magistrate should be introduced, and that the laws should be carried home to individuals themselves. . . . Every member saw that the existing system would ever be ineffectual, unless its laws operated on individuals, as military coercion was neither eligible nor practicable. . . . These considerations determined the Convention to depart from that solecism in politics—the principle of legislation for states in their political capacities. . . . Founded on the state governments solely, as I have said before, it would be tottering and inefficient. It became, therefore, necessary to bottom it on the people themselves, by giving them an immediate interest and agency in the government."⁴⁰⁷

Caldwell said he still "wished to know why the gentlemen who were delegated by the states, styled themselves *We, the people*. He said that he only wished for information."⁴⁰⁸ Iredell answered that "it would be easy to satisfy the gentleman; that the style, *We, the people*, was not to be applied to the members themselves, but was to be the style of the Constitution, when it should be ratified in their respective states."⁴⁰⁹ Taylor brought Caldwell's point out in the open. "Mr. Chairman, the

⁴⁰⁵4 ELLIOT'S DEBATES, *op. cit. supra* note 260, at 15.

⁴⁰⁶*Id.* at 16.

⁴⁰⁷*Id.* at 21-22.

⁴⁰⁸*Id.* at 23.

⁴⁰⁹*Ibid.*

very wording of this Constitution seems to carry with it an assumed power. *We, the people*, is surely an assumed power. Have they said, We, the delegates of the people? It seems to me that, when they met in Convention, they assumed more power than was given them. . . . Matters may be carried still farther. This is a consolidation of all the states. Had it said, *We, the states*, there would have been a federal intention in it. But, sir, it is clear that a consolidation is intended. Will any gentleman say that a consolidated government will answer this country? . . . I am astonished that the servants of the legislature of North Carolina should go to Philadelphia, and, instead of speaking of the *state* of North Carolina, should speak of the *people*. I wish to stop power as soon as possible; for they may carry their assumption of power to a more dangerous length. I wish to know where they found the power of saying *We, the people*, and of consolidating the states.”⁴¹⁰

Maclaine now made the answer. “Mr. Chairman, I confess myself astonished to hear objections to the preamble. They say that the delegates to the Federal Convention assumed powers which were not granted them; that they ought not to have used the words *We, the people*. That they were not the delegates of the people, is universally acknowledged. The Constitution is only a mere proposal. . . . If the people approve it, it becomes their act. Is not this merely a dispute about words, without any meaning what ever? . . . It is no more than a blank till it be adopted by the people. When that is done here, is it not the people of the state of North Carolina that do it, joined with the people of the other states who have adopted it? The expression is, then, right. . . .”⁴¹¹

Congress's power over elections, as elsewhere, sparked debate. Spencer said that “This appears to me to be a reprehensible clause; because it seems to strike at the state legislatures, and seems to take away that power of elections which reason dictates they ought to have among themselves. It apparently looks forward to a consolidation of the government of the United States, when the state legislatures may entirely decay away.

“This is one of the grounds which have induced me to make objections to the new form of government. It appears to me that the state governments are not sufficiently secured, and that they may be swallowed up by the great mass of powers given to Congress. If that be the case, such power should not be given; for, from all the notions which we have concerning our happiness and well-being, the state governments are the basis of our happiness, security, and prosperity. . . . This supersedes the necessity of continuing the state legislatures. This is such an article as I can give no sanction to, because it strikes at the foundation of the governments on which depends the happiness of the states and the general government.”⁴¹²

⁴¹⁰*Id.* at 23-24.

⁴¹¹*Id.* at 24-25.

⁴¹²*Id.* at 51-52.

Iredell answered the charge of consolidation. "I heartily agree with the gentleman, that, if anything in this Constitution tended to the annihilation of the state government, instead of exciting the admiration of any man, it ought to excite the resentment and execration. No such wicked intention ought to be suffered. . . . The very existence of the general government depends on that of the state governments. The state legislatures are to choose the senators. Without a Senate there can be no Congress. The state legislatures are also to direct the manner of choosing the President. Unless, therefore, there are state legislatures to direct that manner, no President can be chosen. The same observation may be made as to the House of Representatives, since, as they are to be chosen by the electors of the most numerous branch of each state legislature, if there are no state legislatures, there are no persons to choose the House of Representatives. Thus it is evident that the very existence of the general government depends on that of the state legislatures, and of course, that their continuance cannot be endangered by it."⁴¹³ As to the power itself, Iredell said "I should, therefore, not object to the recommendation of an amendment similar to that of other states—that this power in Congress should only be exercised when a state legislature neglected or was disabled from making the regulations required."⁴¹⁴

Spencer attacked the clause again, this time on the ground of its generality. He said that "the words in this place were exceedingly vague. . . . In a matter of so great moment, words ought not to be so vague and indeterminate. . . . This clause provides that a Congress may at any time alter such regulations, except as to the places of choosing senators. These words are so vague and uncertain that it must ultimately destroy the whole liberty of the United States. It strikes at the very existence of the states, and supersedes the necessity of having them at all. I would therefore wish to have it amended in such a manner as that the Congress should not interfere but when the states refused or neglected to regulate elections."⁴¹⁵ McDowell said that the clause "points forward to the time when there will be no state legislatures—to the consolidation of all the states. The states will be kept up as boards of elections."⁴¹⁶

And Bloodworth, adverting to Congress's power again, said that "It was easy for them to mention that this control should only be exerted when the state would neglect, or refuse, or be unable in case of invasion, to regulate elections. If so, why did they not mention it expressly."⁴¹⁷ Spencer reiterated his earlier point. "It is well known that men in power

⁴¹³*Id.* at 53.

⁴¹⁴*Id.* at 54.

⁴¹⁵*Id.* at 55.

⁴¹⁶*Id.* at 57.

⁴¹⁷*Id.* at 67.

are apt to abuse it, and extend it if possible. From the ambiguity of this expression, they may put such construction upon it as may suit them."⁴¹⁸ And Galloway asked: "What have the state governments left for them, if the general government is to be possessed of such extensive powers, without control or limitation, without any responsibility to the states? . . . where the great principles of liberty are endangered, no general, indeterminate, vague expression ought to be suffered."⁴¹⁹

On Congress's power of taxation, Spencer said: "Mr. Chairman, I conceive this power to be too extensive, as it embraces all possible powers of taxation, and gives up to Congress every possible article of taxation that can ever happen. . . . I would give them powers to support the government, but would not agree to annihilate the state governments in an article which is most essential to their existence."⁴²⁰ And Goudy stated: "Mr. Chairman, this is a dispute whether Congress shall have great, enormous powers. . . . This clause, with the clause of elections, will totally destroy our liberties. The subject of our consideration therefore is, whether it be proper to give any man, or set of men, an unlimited power over our purse, without any kind of control. The purse-strings are given up by this clause. The sword is also given up by this system. Is there no danger in giving up both? . . . That the Constitution has a tendency to destroy the state governments, must be clear to every man of common understanding."⁴²¹

The treaty power also came under attack. Parker asserted that "The President and seven senators, as nearly as I can remember, can make a treaty which will be of great advantage to the Northern States, and equal injury to the Southern States. They might give up the rivers and territory of the Southern States. Yet, in the preamble of the Constitution, they say *all the people* have done it. I should be glad to know what power there is of calling the President and Senate to account."⁴²² The power was defended by Davie. "The honorable gentleman (Mr. M'Dowall) has spoken of a consolidation in this government. That is a very strange inconsistency, when he points out, at the same time, the necessity of lodging the power of making treaties with the representatives, where the idea of a consolidation can alone exist; and when he objects to placing it in the Senate, where the federal principle is completely preserved. As the Senate represents the sovereignty of the states, whatever might affect the states in their political capacity ought to be left to them. This is the certain means of preventing a consolidation.

⁴¹⁸*Id.* at 68.

⁴¹⁹*Id.* at 70.

⁴²⁰*Id.* at 75.

⁴²¹*Id.* at 93.

⁴²²*Id.* at 115.

How extremely absurd is it to call that disposition of power a consolidation of the states, which must to all eternity prevent it!"⁴²³

Iredell also answered this criticism. ". . . in this case the sovereignty of the states is particularly concerned, and the great caution of giving the states an equality of suffrage in making treaties, was for the express purpose of taking care of that sovereignty, and attending to their interests, as political bodies, in foreign negotiations. . . . It seems to be forgotten that the Senate is placed there for a very valuable purpose—as a guard against any attempt of consolidation. The members of the Convention were as much averse to consolidation as any gentleman on this floor; but without this institution, (I mean the Senate, where the suffrages of the states are equal,) the danger would be greater. There ought to be some power given to the Senate to counteract the influence of the people by their biennial representation in the other house, in order to preserve completely the sovereignty of the states."⁴²⁴

The grants of jurisdiction to the United States courts were vigorously assailed by Spencer. "To these I object, because I believe they will be oppressive in their operation. I would wish that the federal court should not interfere, or have any thing to do with controversies to the decision of which the state judiciaries might be fully competent, nor with such controversies as must carry the people a great way from home. With respect to the jurisdiction of cases arising under the Constitution, when we reflect on the very extensive objects of the plan of government, the manner in which they may arise, and the multiplicity of laws that may be made with respect to them, the objection against it will appear to be well founded. If we consider nothing but the articles of taxation, duties, and exercises, and the laws that might be made with respect to these, the cases will be almost infinite. . . . I know it is said that what is not given up to the United States will be retained by the individual states. I know it ought to be so, and should be so understood; but, sir, it is not *declared* to be so. In the Confederation it is expressly declared that all rights and powers, of any kind whatever, of the several states, which are not given up to the United States, are expressly and absolutely retained, to be enjoyed by the states. . . . Oppression may therefore take place by degrees; but if there were express terms and bounds laid down, when these were passed by, the people would take notice of them, and oppression would not be carried on to such a length. I look upon it, therefore, that there ought to be something to confine the power of this government within its proper boundaries. . . . It would keep the states from being swallowed up by a consolidated government. For the reasons I before gave, I think that the jurisdiction of the federal court, with respect to all cases in law and equity, and the

⁴²³*Id.* at 123.

⁴²⁴*Id.* at 125-33.

laws of Congress, and the appeals in all cases between citizens of different states, etc, is inadmissible."⁴²⁵

Maclaine answered on the point of enumerated and reserved powers. "The powers of Congress are limited and enumerated. We say we have given them those powers, but we do not say we have given them more. We retain all those rights which we have not given away to the general government. . . . If they can assume powers not enumerated, there was no occasion for enumerating any powers. . . . It is as plain a thing as possibly can be, that Congress can have no power but what we expressly give them. There is an express clause which, however disingenuously it has been perverted from its true meaning, clearly demonstrates that they are confined to those powers which are given them. This clause enables them to 'make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officers thereof.' This clause specifies that they shall make laws to carry into execution *all the powers vested* by this Constitution; consequently, they can make no laws to execute any other power. This clause gives no new power, but declares that those already given are to be executed by proper laws. I hope this will satisfy the gentlemen."⁴²⁶

But Spencer was unconvinced. "The gentleman said, all matters not given up by this form of government were retained by the respective states. I know that it ought to be so; it is the general doctrine, but it is necessary that it should be expressly declared in the Constitution, and not left to mere construction and opinion. I am authorized to say it was heretofore thought necessary. The Confederation says, expressly, that all that was not given up to the United States was retained by the respective states. If such a clause had been inserted in this Constitution, it would have superseded the necessity of a bill of rights. But that not being the case, it was necessary that a bill of rights, or something of that kind should be a part of the Constitution. . . . The states do not act in their political capacities, but the government is proposed for individuals. The very caption of the Constitution shows that this is the case. The expression, 'We, the people of the United States,' shows that this government is intended for individuals; there ought, therefore, to be a bill of rights. I am ready to acknowledge that the Congress ought to have the power of executing its laws. Heretofore, because all the laws of the Confederation were binding on the states in their political capacities, courts had nothing to do with them; but now the thing is entirely different. The laws of Congress will be binding on individuals, and those things which concern individuals will be brought properly before the courts. In the next place,

⁴²⁵*Id.* at 136-38.

⁴²⁶*Id.* at 140-41.

all the officers are to take an oath to carry into execution this general government, and are bound to support every act of the government, of whatever nature it may be."⁴²⁷

Iredell said a word on the Supreme Court, "The propriety of having a Supreme Court in every government must be obvious to every man of reflection. There can be no other way of securing the administration of justice uniformly in the several states. There might be, otherwise, as many different adjudications on the same subject as there are states."⁴²⁸ And Davie defended the federal judiciary at some length. "I believe, however, that, before we take into consideration these important clauses, it will be necessary to consider in what manner laws can be executed. For my own part, I know but two ways in which the laws can be executed by any government. If there be any other, it is unknown to me. The first mode is coercion by military force, and the second is coercion through the judiciary. With respect to coercion by force, I shall suppose that it is so extremely repugnant to the principles of justice and the feelings of a free people, that no man will support it. It must, in the end, terminate in the destruction of the liberty of the people. I take it, therefore, that there is no rational way of enforcing the laws but by the instrumentality of the judiciary. From these premises we are left only to consider how far the jurisdiction of the judiciary ought to extend. It appears to me that the judiciary ought to be competent to the decision of any question arising out of the Constitution itself. On a review of the principles of all free governments, it seems to me also necessary that the judicial power should be coextensive with the legislative.

"It is necessary in all governments, but particularly in a federal government, that its judiciary should be competent to the decision of all questions arising out of the constitution. . . . Every member who has read the Constitution with attention must observe that there are certain fundamental principles in it, both of a positive and negative nature, which, being intended for the general advantage of the community, ought not to be violated by any future legislation of the particular states. Every member will agree that the positive regulations ought to be carried into execution, and that the negative restrictions ought not to be disregarded or violated. Without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened. . . . Gentlemen must have observed the contracted and narrow-minded regulations of the individual states, and their predominant disposition to advance the interests of their own citizens to the prejudice of others. Will not these evils be continued if there be no restraint? The people of the United States have one common interest;

⁴²⁷*Id.* at 152-53.

⁴²⁸*Id.* at 147.

they are all members of the same community, and ought to have justice administered to them equally in every part of the continent, in the same manner, with the same despatch, and on the same principles. It is therefore absolutely necessary that the judiciary of the Union should have jurisdiction in all cases arising in law and equity under the Constitution. Surely there should be somewhere a constitutional authority for carrying into execution constitutional provisions; otherwise, as I have already said, they would be a dead letter. . . . I think he must be of **opinion, upon reflection**, that the jurisdiction of the federal judiciary could not have been constructed otherwise with safety or propriety. It is necessary that the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and **treaties observed**. These ends can only be accomplished by a general, paramount judiciary."⁴²⁹

When the convention reached the supremacy clause, it was defended by Iredell. "This clause is supposed to give too much power, when, in fact, it only provides for the execution of those powers which are already given in the foregoing articles."⁴³⁰ After quoting it, "What is the meaning of this, but that, as we have given power, we will support the execution of it? We should act like children, to give power and deny the legality of executing it. It is saying no more than that, when we adopt the government, we will maintain and obey it; in the same manner as if the Constitution of this state had said that, when a law is passed in conformity to it, we must obey that law. Would this be objected to? Then, when the Congress passes a law consistent with the Constitution, it is to be binding on the people. . . . The question, then, under this clause, will always be, whether Congress has exceeded its authority. If it has not exceeded it, we must obey, otherwise not. This Constitution, when adopted, will become a part of our state Constitution; and the latter must yield to the former only in those cases where power is given by it. It is not to yield to it in any other case whatever. . . . It appears to me merely a general clause, the amount of which is that, when they pass an act, if it be in the execution of a power given by the Constitution, it shall be binding on the people, otherwise not. As to the sufficiency or extent of the power, that is another consideration, and has been discussed before."⁴³¹

But Bloodworth said the supremacy clause "appears to me to sweep off all the constitutions of the states. It is a total repeal of every act and constitution of the states. The judges are sworn to uphold it. It will produce an abolition of the state governments. Its sovereignty absolutely annihilates them. . . . This clause will be the destruction of every

⁴²⁹*Id.* at 155-60.

⁴³⁰*Id.* at 178.

⁴³¹*Id.* at 178-79.

law which will come in competition with the laws of the United States. Those laws and regulations which have been, or shall be, made in this state, must be destroyed by it, if they come in competition with the powers of Congress."⁴³²

Maclaine made answer to Bloodworth. "But, says the gentleman last up, the Construction of the Constitution is in the power of Congress, and it will destroy the sovereignty of the state governments. But what is the sovereignty, and who is Congress? One branch, the people at large; and the other branch, the states by their representatives. Do people fear the delegation of power to themselves—to their own representatives? But he objects that the laws of the Union are to be the supreme laws of the land. Is it not proper that their laws should be the laws of the land, and paramount to those of any particular state?—or is it proper that the laws of any particular state should control the laws of the United States? Shall a part control the whole? To permit the local laws of any state to control the laws of the Union, would be to give the general government no powers at all. If the judges are not bound by it, the powers of Congress will be nugatory. This is self-evident and plain. . . . Every gentleman must see the necessity for the laws of the Union to be paramount to those of the separate states, and that the powers given by this Constitution must be executed. What, shall we ratify a government and then say it shall not operate? This would be the same as not to ratify."⁴³³

When the discussion of the Constitution clause by clause had been completed, Governor Johnston moved that the convention ratify the Constitution and recommend amendments. The procedure at this point is not clear, but apparently no vote was ever taken on Johnston's motion. Instead a resolution offered by Jones was carried, under which the convention did not reject, but simply refused to ratify the Constitution at the present time, Jones being of the opinion that North Carolina could enter the new nation whenever she wished to do so. Jones's resolution also called for a declaration of rights and a series of amendments. Iredell moved to substitute for Jones's proposal an unconditional ratification with six recommended amendments, but this was voted down, 184 to 84. The convention then voted, by an identical division, to support Jones's plan.

Several of the amendments approved by the convention are germane to this study. The first declared "That each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government."⁴³⁴ The eighteenth pro-

⁴³²*Id.* at 179-80.

⁴³³*Id.* at 180-82.

⁴³⁴DOCUMENTS, *op. cit.* *supra* note 400, at 1047.

vided "That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the power of Congress; but that they be construed either as making exceptions to the specified powers, where this shall be the case, or otherwise as inserted merely for greater caution."⁴³⁵ Others included the usual limitations on Congress's powers with respect to elections, taxes, the militia and navigation laws. Two proposed amendments dealt with treaties, one providing "That no commercial treaty shall be ratified without the concurrence of two thirds of the whole number of the members of the Senate. . . ."⁴³⁶ and the other that no treaty shall be valid "which is contradictory to the Constitution of the United States."⁴³⁷

Although the convention refused to ratify the Constitution, there is reason to believe that the anti-Federalists did not intend to keep North Carolina permanently out of the union. The motivation seems rather to have been, by withholding approval, to encourage the adoption of amendments. Actually, care was taken to protect the future position of the state. As its closing action, the convention adopted a resolution offered by Jones which stated that "Whereas this Convention has thought proper neither to ratify nor reject the Constitution,"⁴³⁸ it was recommended to the legislature that, should Congress lay an impost on goods imported into the ratifying states, the legislature should lay a similar impost, for the use of Congress, on goods imported into North Carolina. After this action, the convention adjourned on August 4.

Fifteen months later, a second convention of two hundred and ninety-four delegates met at Fayetteville from November 16 to November 23, 1789. At least one hundred and twenty delegates from the first convention were present. Iredell was absent from the Federalist ranks, but Johnston and Davie were present, augmented by Hugh Williamson. Of the opposition, Jones was missing, but Spencer, Bloodworth, Lenoir and Caldwell were there. This time, however, the story was vastly different. The dominant anti-Federalist party of 1788 had now dwindled to an insignificant minority. The new government under the Constitution was in operation, and it had become apparent that North Carolina had no future as an independent state. Further, the new Congress had already submitted twelve amendments to the Constitution to the states for ratification.

The debates in the second convention were not recorded, but must have been brief in any case. On November 17, Hugh Williamson moved for ratification. On November 18, 19, and 20, the Constitution and the amendments proposed by Congress were considered in committee of

⁴³⁵*Id.* at 1050.

⁴³⁶*Id.* at 1048.

⁴³⁷*Id.* at 1051.

⁴³⁸ ELLIOT'S DEBATES *op. cit. supra* note 260, at 251.

the whole. The Constitution was then ratified by a vote of 194 to 77, this being a greater majority than the anti-Federalist majority of the previous year. Then, as a concession to the opposition, the convention recommended eight further amendments.

There remained only one of the original thirteen states. Rhode Island, among all the states, had been most reluctant to increase the powers of Congress under the Articles. There, devotion to state sovereignty and, consequently, anti-federalism reached their peak. Only Rhode Island had refused to send delegates to the Federal Convention, this prompting a group of merchants in Providence to send a letter to the Convention apologizing for the action of the state and expressing their individual agreement with the movement for a stronger government.

When the Constitution was received in Rhode Island, the assembly refused to call a convention and instead submitted the Constitution directly to the freemen voters to be voted on in town meetings. The Federalist minority protested against this action by staying away from the polls, with the result that the vote in March, 1788, showed 2,708 against the Constitution, and only 237 for it. Six times thereafter over a period of almost two years the Rhode Island assembly refused to call a state convention to consider the Constitution. Unfortunately, in Rhode Island the Federalists were not only in the minority, they lacked the leadership of skilled and able men which had turned the tide in other states.

It was the force of external pressures which finally brought Rhode Island into line. In 1789, shortly after the new government was formed, Congress passed an impost law. Goods from North Carolina and Rhode Island were excepted from the impost, but only until January 15, 1790. By this expiration date, North Carolina had ratified and Rhode Island stood alone. In the middle of January, therefore, the assembly by a very close vote—34 to 29 in the house and 5 to 4 in the senate—finally authorized the election of delegates to a convention. The result of the election was a decided victory for the anti-Federalists.

The convention of seventy delegates met in South Kingstown on March 1, 1790. None of the discussion has been preserved. A committee appointed for the purpose recommended a bill of rights of eighteen sections, and twenty-one amendments. The convention on March 6 adjourned until May 24 so that the bill of rights and amendments might be considered by the freemen at the annual elections on April 21. These elections again resulted in complete victory for the anti-Federalists.

But the pressure from outside the state continued. On April 28, in the United States Senate, a committee was appointed "to consider what provisions will be proper for Congress in the present session respecting

the state of Rhode Island.”⁴³⁹ On May 11, on this committee’s recommendation, a resolution was introduced that “all commercial intercourse between the United States and Rhode Island”⁴⁴⁰ should be prohibited after July 1. The resolution also authorized the President to “demand” of Rhode Island payment of a share of the revolutionary debt.

In the face of these threats, the Rhode Island convention reassembled on May 24. Again, no records of the proceedings were preserved. On May 29, 1790, the convention ratified the Constitution by a bare majority. The vote was 34 to 32. The ratification was preceded by a declaration of eighteen rights, the third of which stated that “That the rights of the states respectively, to nominate and appoint all state officers, and every other power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States or to the departments of government thereof, remain to the people of the several states, or their respective state governments to whom they may have granted the same; and that those clauses in the said constitution which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution, but such clauses are to be construed as exceptions to certain specified powers, or as inserted merely for greater caution.”⁴⁴¹

It was “Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said constitution, and in confidence that the amendments hereafter mentioned will receive an early and mature consideration, and conformably to the fifth article of said constitution, speedily become a part thereof,” that the convention ratified the Constitution “in the name, and in the behalf of the people, of the state of Rhode Island.”⁴⁴²

Then followed twenty-one recommended amendments.⁴⁴³ The first was verbatim from Article II of the Articles of Confederation: “The United States shall guarantee to each state its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this constitution expressly delegated to the United States.” The second would have made Congress’s power over elections contingent upon a state’s neglect or refusal to act. Three and five would have limited the judicial power of the United States. The eighth would have required resort to the requisition system prior to the imposition of direct taxes. The ninth would have required the consent of three-fourths of the state

⁴³⁹BATES, RHODE ISLAND AND THE FORMATION OF THE UNION 192 (1898).

⁴⁴⁰*Ibid.*

⁴⁴¹DOCUMENTS, *op. cit. supra* note 400, at 1052.

⁴⁴²*Id.* at 1055.

⁴⁴³*Id.* at 1056-59.

legislatures for any direct taxes. Thirteen and fourteen would have required a two-thirds vote in Congress to borrow money and declare war. Eighteen would have given the state legislatures power of recall over Senators.

CONCLUSION

Speaking in the House of Representatives in 1796, James Madison said: "But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution.

As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through their several state conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the general convention, which proposed, but in the state conventions, which accepted and ratified the Constitution."⁴⁴³

Madison's statement has been largely disregarded. The debates in the Federal Convention and the discussions in the Federalist Papers have been accorded far more weight in constitutional interpretation than have the debates in the state conventions. And yet on the subject matter of this study—state sovereignty as affected by the Constitution—it is the debates of the state conventions that the understanding of the people of the time is most clearly and explicitly manifested.

Literally dozens of specific criticisms were made against the Constitution by the opponents of ratification. Most of these coalesce into two broad and fundamental grounds of objection. One was the absence of a Bill of Rights; if the power of the new national government was to be exercised directly upon individuals, then it was argued that limitations upon that power should be expressly set forth so as to protect certain individual liberties from destruction or infringement. Second was the belief that the Constitution would inevitably result in the complete destruction of state sovereignty and the reduction of state power to insignificance. It is with regard to this second seminal ground of opposition to the Constitution that the state convention debates have been set forth in relevant extracts.

It is an outstanding fact that state sovereignty received a much sturdier and more vigorous defense in the state conventions than in the Federal Convention. Indeed, one cannot fail to be impressed by the narrow margin of victory for the forces of ratification in several of the state conventions. The vote in Massachusetts was 187 to 168, in New Hampshire 57 to 47, in Virginia 89 to 79, in New York 30 to 27, and

⁴⁴³ FARRAND, *THE RECORD OF THE FEDERAL CONVENTION* 374 (rev. ed. 1937).

in Rhode Island 34 to 32. A change of 26 votes in these five states—10 in Massachusetts, 6 in New Hampshire and Virginia, and 2 in New York and Rhode Island—and the Constitution would have been defeated. In spite of these close divisions on whether the Constitution should be ratified, there was remarkably broad agreement between anti-Federalists and Federalists on how the Constitution would affect state sovereignty.

The anti-Federalists frequently made the blanket charge that the Constitution would result in a "consolidated" government. It is doubtful if more than a few who used the term actually believed that the states would be literally obliterated as geographical and political entities. But the Federalists would invariably reply to the charge of "consolidation" by pointing to the many ways in which the structure of the national government assumed and was predicated on the continued existence of the states. This answer was not, of course, responsive to what most of the anti-Federalists had in mind, namely, that the powers of the national government would be so great as to reduce the states to a position of complete and impotent subordination. The belief and fear which underlay the charge of "consolidation" was not that the Constitution would abolish the states as such, but that it would destroy their sovereignty.

When the general charge was reduced to particulars, there was usually little disagreement as to the potential scope and extent of the Constitution's grants of power to the national government. When the anti-Federalists charged that a national power was unlimited, the Federalists did not usually deny that this was true as a matter of law, but argued that, for various reasons, the power in practice would not be carried to its ultimate. Thus, Congress's power to control the time, place and manner of elections of representatives and senators was opposed as being so broad as to permit Congress to practically exclude the states from any control in this area. The answer of the Federalists was not to deny the charge but to assert that Congress probably would not exercise the power at all unless it became necessary to protect its own existence, that is, unless the states failed or refused to provide for elections.

Again, when it was charged that Congress's taxing power was virtually unlimited and could be used to undermine the taxing power and therefore the political strength of the states, the answer was that the states would enjoy a concurrent power of taxation. And when it was asserted that the absence of limitations would enable Congress to take any or all sources of revenue for federal taxation, the answer was not a denial that this was constitutionally possible, but simply that it was necessary that Congress have the power so as to provide for all possible emergencies and that it should not be assumed that the power would be abused. The same general pattern is observable in connection with the

objections to Congress's military powers and the treaty power as avenues for the invasion of the area of state power.

As to the necessary and proper power, the difference between Federalists and anti-Federalists was more semantic than real. This "sweeping clause," according to the opposition, would further expand the powers of the national government to an undefinable extent, and thus assimilate all those things which had been, or ought to be, considered as within the province of the states. The Federalists argued, in effect, that the clause was mere tautology, that everything expressly authorized by the clause was impliedly authorized by the express grants. It is important to note that both views recognize the departure from the requirement of the Articles that only expressly granted powers could be exercised, and both views therefore repudiate a strict construction approach to national power.

On other particulars vitally important to the question of state sovereignty versus national supremacy, opponents and supporters of the Constitution were in agreement. The anti-Federalists complained that the supremacy clause would reduce all the state constitutions and state laws to a position inferior to the U. S. Constitution, national laws and treaties. The Federalists replied that that was exactly what it was intended to do, and that it was essential that it be so. The anti-Federalists asserted that the Constitution in its most important provisions was ambiguous, general and indefinite. The Federalists answered that it was as plain and clear as the subject matter permitted.

The anti-Federalists charged that this generality and ambiguity opened the way to a loose construction expanding national power at the expense of state power. The Federalists replied that it should not be assumed that the Constitution would be construed improperly or unfairly. The anti-Federalists alleged that the Constitution would invariably favor national power, since the national government had the power to construe its own powers. The Federalists agreed that the power of interpretation was in the national government, but maintained that it was necessarily so in order to assure its supremacy.

The anti-Federalists charged that the judicial power of the United States courts was so great as to overwhelm the state judiciaries and further consolidate all power in the national government. The Federalists replied that it was necessary that the judicial power of the United States should be coextensive with the legislative power in order to assure national supremacy that it should not be assumed the federal courts would exercise powers beyond their proper extent, and that in any case, there would still be plenty of litigation to keep the state courts busy.

The anti-Federalists complained again and again of the lack of a clear-cut dividing line between national and state power to prevent encroachment on state power. The Federalists replied that, under the

proper rule of construction, the national government would have only those powers expressly delegated to it or fairly implied therefrom, and that all other powers would be reserved to the states. The anti-Federalists countered that the Constitution required no such rule of construction and there was no assurance it would be followed after ratification. In any event, it was no real answer to the objection, for such a rule of construction imposed no limitation on the extent to which a delegated power could be carried by interpretation nor on what national powers could be derived by implication.

The Federalists maintained that the broad dividing line was between matters of national and matters of local importance, but offered no formula for distinguishing the two. The Federalists also asserted that the federal judiciary would have the power to invalidate acts of Congress which transcended its powers, but this raised again the objection that the national government was construing its own powers and, further, it was no limitation on the expansion of judicial power. Finally, the Federalists sought to minimize the importance of the objection by invoking the doctrine of popular sovereignty. Both national and state governments were the recipients of power granted by the people, and what real difference did it make which government exercised the power, the people were supreme in either case.

When the anti-Federalists thus lamented the lack of *constitutional* limitations on the powers of the national government to keep it from overwhelming the state governments, the main answer of the Federalists was to point to those features of the Constitution which afforded *political* limitations on the *exercise* of the national powers. The bicameral Congress in which each house, representing a different constituency, had to approve all laws, was one such political check. Repeatedly the Senate was characterized as the agency created for the express purpose of representing the states as such in the national government, thus affording them a means of protecting their sovereignty. The executive power of veto was another check.

Repeatedly, too, the Federalists asserted that members of Congress, being elected in the states, would be imbued with an attachment to state and local interests. The desire for re-election would ever make them responsive to state and local attitudes and opinions. The existence of the state legislatures as watchful guardians and articulate organs of protest was another political fact of life. The real danger, the Federalists claimed, was not that the rights and powers of the states would not be respected, it was that national powers would be vitiated and national interests ignored.

It is no coincidence that those aspects of the Constitution which were attacked most strenuously in the conventions were the favorite subjects of the recommended amendments. Four states—Delaware, New Jer-

sey, Georgia and Connecticut—ratified without proposing amendments. In two states — Pennsylvania and Maryland — attempts to recommend amendments were defeated. Amendments were recommended by the conventions in Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina and Rhode Island.

Of these seven states, six conventions recommended an amendment which would reserve to the states all powers not delegated to the United States. Four of these referred to powers not “expressly” delegated. In New York it was one of the “understandings” on which ratification was based that all powers not “clearly” delegated were reserved. All seven conventions recommended an amendment making Congress’s power over elections conditional on state refusal or neglect to act. All seven conventions wanted an amendment limiting Congress’s power to lay direct taxes by requiring prior resort to state requisitions. Six conventions recommended limitations of various kinds on the judicial power of the United States. Five conventions recommended amendments imposing various limitations on the military powers of Congress. The commerce power, the borrowing power, and the treaty power were subjects of recommended amendments in two states each. One state wanted an amendment providing for state recall of Senators.

Two important conclusions may be drawn from the recommendation of these amendments. First, they were in no sense conditions upon the ratification of the Constitution in any state. Efforts were made in the conventions to make adoption of the amendments a condition precedent to the taking effect of the ratification, but this was recognized as being equivalent to a rejection of the Constitution as it stood, and such efforts were defeated. This issue was well understood and fully articulated by both sides, and the records leave no room for doubt that the Constitution was ratified unconditionally in every state, and that the amendments were recommendations only.

Second, the fact that amendments limiting national powers in favor of state power were considered to be necessary or desirable clearly demonstrates the understanding in the conventions that, without the amendments, there would be no such limitations. This conclusion, although self-evident on its face, is amply supported by the debates. The mere recommendation of amendments was in no sense conceived to be a diminution of the national powers, but rather a recognition and measure of the scope of those powers in the Constitution as it was drafted and as it was ratified. Any limitation on the national powers granted in the original Constitution could be determined only by reference to the amendments which were actually adopted after the Constitution was ratified. This is beyond the purview of this study, but it is not amiss to note that the Tenth Amendment is the only one of the amendments adopted immediately after ratification which dealt with the question of national and state power.

What was the understanding in the conventions as to the finality of the choice which was being made? All the evidence there is supports the conclusion that ratification was considered to be permanent and irrevocable. It was explicitly so recognized in the *Letters of a Federal Farmer* and *Letters of Agrippa* by the anti-Federalists Richard Henry Lee and James Winthrop, and also by James Madison in his letter to the New York convention. The New York convention at the end rejected a motion by Lansing which would have reserved the right of New York to withdraw from the Union unless amendments were submitted to a general convention. Indeed, the whole idea of amendments is inconsistent with the idea that a state could withdraw from the union at will.

It is to be noted, also, that no ratification resolution contains such a reservation. One of New York's "understandings" was that "the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness," and a like statement was made by the Rhode Island convention. Virginia was more explicit. That state's convention declared that "the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression" No state convention declared any such power of resumption by a state or even by the people of a state.

One final point of agreement remains to be noted. The anti-Federalists opposed the Constitution for the reason that it destroyed the kind of government which they cherished, namely, a confederation of sovereign states. The Federalists did not deny that this was so; rather, they defended the necessity and desirability of the change. The Constitution was characterized by many delegates as an ordinance of the American people. But not a single delegate in a single state convention maintained that the Constitution was a compact between sovereign states. On this point the understanding was unanimous.

STATE SOVEREIGNTY AND THE CONSTITUTION—A SUMMARY VIEW†

William P. Murphy*

Under Article II of the Articles of Confederation each state retained its sovereignty and independence, and every power, jurisdiction, and right which was not expressly delegated to the United States. This precluded the existence of any implied powers. The powers which were expressly delegated to Congress were limited, but even as to these, there was no power of enforcement. The central government, with rare exceptions, operated not on individuals but through the states, and its authority was effective only so far as, and no farther than, the states were willing to accept it. The states remained free to ignore the central government with impunity, which they did, in spite of their pledged word in Article XIII that they would abide by the determination of Congress on all matters delegated to it. Under the Articles, there existed in America a compact of sovereign states with a mutual agent. And history records that it was a failure.

Throughout the colonies there were men of prominence who were determined, for reasons sufficient to themselves, to eradicate this system. Being individuals of surpassing political skill and ability, and aided by the course of events under the Articles, they brought about the calling of the Constitutional Convention of 1787 and dominated its membership. The fundamental purpose of the Convention was to change the system. The Founding Fathers decided at the outset that no mere federation would suffice. Instead, they created a national government which would operate directly on individuals, gave it vastly increased sweeping powers, and created a national executive and a national judiciary for their enforcement. Severe limitations were placed on the powers of the states, and the supremacy of the central government over the states was clearly and expressly set forth. With deliberate intent and great care, the Founders remedied the defects of the system under the Articles. And because it was recognized that the Constitution was fatal to the sovereignty of the states, they by-passed the state governments and went

†This article concludes a study which began with *State Sovereignty Prior to the Constitution*, 29 Miss. L.J. 115 (1958); continued with *State Sovereignty and the Founding Fathers*, 30 Miss. L.J. 135 (1959); 30 Miss. L.J. 261 (1959); and 31 Miss. L.J. 50 (1959); continued with *State Sovereignty and the Drafting of the Constitution*, 31 Miss. L.J. 203 (1960); 32 Miss. L.J. 1 (1960); 32 Miss. L.J. 155 (1961); and 32 Miss. L.J. 227 (1961); and continued with *State Sovereignty and the Ratification of the Constitution*, 33 Miss. L.J. 29 (1961); 33 Miss. L.J. 164 (1962); and 33 Miss. L.J. 294 (1962).

*Professor of Law, University of Mississippi.

directly to the people for ratification of the great transition. There was no misunderstanding as to the effect that the Constitution would have upon state sovereignty, for in the campaign for ratification one of the principal bases of opposition to the Constitution was that it would destroy the sovereignty of the states.

Study of the contemporary sources reveals that among both the supporters and opponents of the Constitution, there was no doubt, disagreement or misunderstanding on the following particulars. Ratification of the Constitution was final and irrevocable, and no right of secession from the United States was contemplated. The power to determine constitutional meaning and applicability lay with the instrumentalities of the national government. In making such determinations there was no expectation that any strict construction in favor of state power would be followed. Although national powers were enumerated, state power was not expected to be a constitutional limitation on the scope or extent of any enumerated national power.

It is obvious, however, from even a cursory view of American constitutional history since 1789, that the ratification of the Constitution did not settle these matters permanently, or even for very long. As noted at the very beginning of this study, almost immediately after the adoption of the Constitution the argument was advanced that since the states were sovereign under the Articles they were still sovereign except to the extent that sovereignty had been expressly surrendered in the Constitution, and therefore national powers should be strictly and narrowly construed. It was argued then that the Tenth Amendment supported the strict construction approach, and the same argument is still being made today.

Later a more vigorous position was taken. The admission made during the ratification campaign that the Constitution was fatal to state sovereignty was now conveniently forgotten, and the discovery was made that it was an idle thing which had been done after all, that the system of government under the Constitution was still what it had been under the Articles of Confederation, namely, a compact of sovereign states. From this premise there flowed logically the doctrines of state interposition and nullification articulated by John C. Calhoun, the brilliant preCivil War high priest of state sovereignty. Finally, there came the most radical assertion of all. Since the Union was merely a compact of sovereign states, it followed that there was no such thing as a permanent and indivisible nation. Therefore, by the same process through which it ratified the Constitution and entered the Union in the first place, *i.e.*, an exercise of popular sovereignty, a state could likewise secede from the United States.

It may be stated flatly that none of these doctrines—strict construction of the Constitution, interposition or nullification, and secession—

can find support from the contemporary sources on the drafting and ratification of the Constitution. Beyond a few scattered passages taken out of context, the evidence of 1787-1788 is overwhelming against each of them. And yet it is undeniable that these doctrines have had an enormous impact upon American history. They have been burning issues over which men have argued, fought and died. How could it happen that doctrines so demonstrably untenable could have attained such vitality?

It is true that Elliot's *Debates* were not published until 1836 and Madison's *Notes* not until 1840. From this it might be suggested that state sovereignty doctrines were able to thrive because their documentary refutation remained undisclosed for fifty years after ratification. This explanation, however, is both superficial and erroneous. It is erroneous for the reason that the philosophical and political advocates of the state sovereignty doctrines were participants in, or at least contemporaries of, the drafting and ratification of the Constitution and were fully aware of the understanding at the time. One need go no further than Madison and Jefferson who, less than ten years after the Constitution became operative, authored the Virginia and Kentucky Resolutions setting forth a compact theory of the Constitution. In Madison's case, considering the extent of his nationalism in 1787, this is one of the most complete turnabouts in history.

But any explanation is superficial which fails to take into account the fact that men of affairs almost invariably espouse those philosophies, forms and policies of government which they feel will best protect and advance their own economic and social interests. As we saw in the first part of the study, this was true in the drafting of both the Articles of Confederation and the Constitution. The conservative nationalists who were defeated in 1776 did not accept the result as being irremediable. Similarly, the opponents of strong central government in 1787, while they accepted ratification of the Constitution as final, did not accept as inevitable in practice the fulfillment of that national power of which the Constitution was the promise. What they did was completely natural. They engaged in political action to restrain and limit the use of national power and they advanced interpretations of the Constitution which would protect the power of the states against national aggrandizement.

In their political struggle the advocates of the state sovereignty doctrines found their principal sources of strength and support in the circumstance to which Madison and Hamilton had repeatedly called attention. This was the political fact that the people as a general rule would feel closer to their state and local governments and more remote from the national government. Since members of Congress were to be elected by local constituencies, it was maintained that the men elected to these

offices would carry with them into national office a tendency or predisposition to favor state over national power. And survival in office would frequently demand giving precedence to parochial and provincial over national and general interests.

Time has demonstrated the acuteness of Madison's and Hamilton's perception. Throughout our history, far more often than not, Congress has been very sensitive to the existence of state interests and to areas and subjects of state power. Such political considerations have frequently resulted in the non-use of national powers. This has been true even to the point of reducing some of these powers to a dormant state. Congress's power to control the manner of election of Representatives and Senators has never been utilized to any great extent, and even the modest exercise of this power being proposed today is bitterly opposed as an invasion of states' rights. To give another example, Congress's powers under the full faith and credit clause remain to this day virtually untapped.

In their Constitutional struggle the defenders of state sovereignty were immensely aided by the very characteristic of the Constitution against which they had vigorously protested in the ratification campaign; namely, its generality and ambiguity. It was recognized by all hands in 1787-88 that the Constitution's generalities opened the way to indefinite augmentation of national power through latitudinal construction. Indeed, the main defense of the Constitution's generality was that it would permit whatever national action the future exigencies of an unknown future might demand. But, by definition, ambiguity means the capability of supporting more than one meaning or interpretation. If the Constitution could support an interpretation which favored national power, it could also support a construction that favored state power. And so began the perennial debate between "liberal" and "strict" construction through which contests between national and state power have been waged ever since, with each side claiming that its interpretation of the Constitution is the "true" one.

The advocates of the state sovereignty doctrines soon found another ally in their struggle, and again it was through one of the features of the Constitution against which they had levied severe strictures. This ally was the federal judiciary, and especially the United States Supreme Court. The establishment of judicial review—the power to interpret the Constitution with finality and to invalidate acts contrary to that interpretation—provided the advocates of state sovereignty with the device through which their views could be given legal efficacy. Although judicial review was established by a relatively nationalist minded Marshall Court, it was put to far different uses in the century following Marshall's death.

It is true that the Supreme Court never yielded to state sovereignty

doctrines in their advanced forms—nullification, interposition, and secession. But the Court did, on many occasions and as recently as 1936, accept the doctrine of strict construction of the Constitution against national power and in favor of state power. What came to be known as “dual sovereignty” was, in essence, no more than a holding that the mere existence of state power was in and of itself a limitation on the scope of national power. The doctrine that national powers were enumerated and those not enumerated were reserved to the states served as a sufficient reason for giving a narrow interpretation to the enumerated powers. State autonomy was elevated to state sovereignty by judicial construction. And if there were also decisions which applied the contrary construction, it only served to underscore the power of the Court and the importance of having a majority on the side one preferred.

The facility with which men could find in the amorphous language of the Constitution approval and sanction of their own political and economic philosophies prompted John Adams, at an early date in our history, to declare that “I have always called our Constitution a game at leap frog.”¹ American constitutional history from John Adams’s day to mid-twentieth century America amply demonstrates the truth of his observation. The listing of great nationalist decisions by the Supreme Court could be paralleled by a similar catalogue of decisions favoring states’ rights.

And yet there is reason to believe that the last leap may have been taken, so far as constitutional law is concerned. The compact theory of the Constitution and the state sovereignty doctrines which flowed from it were abandoned after the Civil War and may today be considered extinct, despite the recent abortive attempts to revive them in the various interposition resolutions adopted by Southern legislatures. And the strict construction approach to the Constitution may well have received the final and lethal blow in the Supreme Court’s recognition in 1941 that the tenth amendment is merely a truism which is declaratory of a relationship and hence is not a substantive limitation on national power.

Modern society increasingly makes exercise of national power an imperative, and the allegiance of the people to the national government increases commensurately with their expectations and demands. Strict construction thus loses the support of public opinion. It is inconceivable to imagine ever again Supreme Court decisions comparable to those of 1935 and 1936. Even the polemics of Southern Senators in the field of civil rights lack real conviction that national power is inadequate to the purpose. In the future, the distribution of power between nation and state will continue to be a political and a legislative question, as it always has been. But it is doubtful if ever again it will be a constitutional and a judicial question as it has been in the past. The future

¹JENSEN, *THE ARTICLES OF CONFEDERATION* 245 (1940).

debates over the respective roles and functions of nation and states will increasingly turn on questions of policy rather than power.

This study has been an inquiry into the dialectics of original intent on the question of the relationship and the distribution of power between the national government and the states under the Constitution. The contemporary understanding of the men who drafted the Constitution and the men who supported and opposed its ratification has been set forth in the preceding parts of the study. To the author the validity of the conclusions reached is clear beyond doubt. In one sense, of course, any inquiry into original intent is futile, for it is true that, in the final analysis, the actions of men, including their interpretations of the Constitution, are determined more by the demands and desiderata of the present than by the understanding of the past. It is also true that the intent and understanding of 1787-88 was almost immediately challenged, and has subsequently been denied, confused, submerged and even lost at times throughout our history. And arguably this has been a good thing for the country.

The fact that original intent lacks the power to control later action does not, however, render inquiries into original intent irrelevant. Throughout our history, justification has always been sought for conflicting constitutional interpretations in terms of original intent. Men prefer to defend their positions not only on grounds of the expediency of the moment but also in terms of historic legitimacy. So long as there is constitutional debate, it seems inevitable that original intent will be a part of the rhetoric. Knowledge on the subject is therefore necessary for forensic purposes.

The author feels, however, that there is a larger and more fundamental value to be derived from this study. It is trite to observe that the national government today exercises greater and more pervasive powers than ever before in our history. Of course, there never has been and never can be a permanently fixed number of public functions or subjects of power with clearly established and mutually exclusive lists of what is national and what is state or local. In a complex and interdependent industrial society, it is a commonplace that what was local yesterday today has assumed dimensions and effects which transcend state boundary lines. Much of the increased activity of the national government in this century has resulted from the fact that modern society generates problems which are beyond the capacity of individual states to control. The trend seems likely to accelerate rather than to abate.

While most Americans accept the necessity of an increased centralization of authority in order to cope with the problems of today's world, there are also feelings of misgiving and inquietude. Although events and circumstances make increased national activity imperative, many persons are apprehensive that we are departing from the original grand

design of the Constitution, that although the increased exercise of national power can be justified on grounds of expediency, it nevertheless lacks historic legitimacy. The author has frequently entertained such feelings, and for that reason this study has been not only an education but also a comfort and a consolation.

Speaking in the Constitutional Convention, James Madison stated that "The great objection made against an abolition of the state governments was that the general government could not extend its care to all the minute objects which fall under the cognizance of the local jurisdictions. The objection as stated lay not against the probable abuse of the general power but against the imperfect use that could be made of it throughout so great an extent of country, and over so great a variety of objects. As far as its operation would be practicable it could not in this view be improper; as far as it could be impracticable, the convenience of the general government itself would concur with that of the people in the maintenance of subordinate governments. Were it practicable for the general government to extend its care to every requisite object without the cooperation of the state governments the people would not be less free as members of one great republic than as members of thirteen small ones."² The states have never since 1787 been in any danger of being abolished. The historic contest has been waged over questions of respective sovereignty and power of nation and state. After 170 years, we seem finally to have settled on the approach originally advanced by Madison.

Remembering that the Constitution was grounded on the Virginia Plan of which James Madison was the author, the words of the "father of the Constitution" in his letter to Washington on the eve of the Convention have modern relevance. "Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty, and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be subordinately useful."³

There has been no departure from our ancient moorings. The Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."⁴ The grand design has not been abandoned. It is continually being fulfilled.

²¹ FARRAND, *THE RECORD OF THE FEDERAL CONVENTION* 356 (rev. ed. 1937).

³¹ *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 287 (1844 ed.).

⁴ *McCulloch v. Maryland*, 17 U.S. (8 Wheat.) 316, 415 (1819).

State Bar Section

THE SENATE JUDICIARY COMMITTEE†*

The Senate of the United States operates by the committee system. To gain consideration by the whole body, except in cases of unanimous consent, a matter must run the gauntlet of a committee.

The Committee on the Judiciary of the United States Senate was created during the 14th Congress—about 145 years ago. In the course of its existence, it has had thirty-nine chairmen. Some of them have been famous. The fifth chairman of the Senate Judiciary Committee was Senator Martin Van Buren of New York, who later became President of the United States. Other famous chairmen of the Senate Judiciary Committee have included Senator John M. Clayton of Delaware (the Cláyton of the Clayton-Bulwer Treaty), Senator Lyman Trumbull of Illinois, Senator George F. Hoar of Massachusetts, Senator George W. Norris of Nebraska, Senator Henry Fountain Ashurst of Arizona (who was the first Senator elected from his state when it joined the Union, and who served in the Senate for thirty years), and Senator Pat McCarran of Nevada. Senator William E. Borah of Idaho became ranking member when Senator Albert Cummins of Iowa died on July 30, 1926, but Borah was chairman of the Foreign Relations Committee at the time and was not officially declared chairman of the Judiciary Committee. Senator Matthew Neely was chairman for three days, before his resignation from the Senate became effective. (Senator Neely resigned to become Governor of West Virginia.)

Great and momentous issues have been committed to the Senate Judiciary Committee.

When President Roosevelt proposed his plan for "packing" the Supreme Court of the United States, the issue was fought out initially within the Senate Judiciary Committee, and it was ten members of the Judiciary Committee who filed a bold and stinging adverse report characterizing the "court-packing bill" as "a needless, futile, and utterly dangerous abandonment of constitutional principle" which "should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

When the Supreme Court of the United States propounded the novel doctrine that, quite apart of any question of eminent domain, the tidelands along all the coasts of the nation belonged not to the states or to grantees of the states, but to the federal government (on the basis of a new theory of "paramount right" which confused sovereignty with

†Reprinted from THE OXFORD LAWYER, vol. 2, no. 2, pp. 13-19 (1959).

*By Senator James O. Eastland, United States Senator from Mississippi; member, Mississippi State Bar.

ownership) and it became necessary for Congress to act in order to restore the rights of the states and their grantees, it was the Senate Judiciary Committee which held the basic hearings and reported the original tidelands bill.

The problem of portal-to-portal pay was thrashed out in hearings before a subcommittee of the Committee on the Judiciary of the Senate.

The Internal Security Act of 1950 came from the Senate Judiciary Committee, as did the Immigration and Nationality Act of 1948, which was the outgrowth of more than two years of hearings, and represented a complete rewriting and recodification of all the immigration laws of the nation. The Criminal Code has been entirely overhauled and codified in the Judiciary Committee during the period of my membership. The patent laws of the United States recently were codified by the Judiciary Committee.

All contracts among or between any of the several states of the Union require approval by the Congress, under the Constitution of the United States; and it is one of the functions of the Judiciary Committee to analyze all such proposed compacts or contracts and report upon them to the Senate.

In the event a petition making charges of official misconduct against a Senator should be transmitted to the Senate, precedent requires that the petition be referred to the Committee on the Judiciary with a view to determining whether the document is privileged and whether it should be presented to the Senate.

A subpoena issued from a United States District Court and served upon a member of a Senate committee would be referred, according to precedent, to the Committee on the Judiciary for a report. (Precedent requires that a Senator, while the Senate is in session, shall not respond to a subpoena without the approval of the Senate itself.)

Within the sphere of its jurisdiction, the power of a Senate committee over legislation is very great. An incident of this power, in the case of the Judiciary Committee, was the petition, filed in 1932 by twenty-four members of the Senate, including many of the most outstanding members of the body, asking the Judiciary Committee to report to the Senate resolutions pending before it dealing with the repeal of the eighteenth amendment (prohibition), in order that a vote might be had on the question.

At the present time the Committee on the Judiciary of the United States Senate consists of fifteen Senators. Its membership has been much smaller at different times in the past. There are one hundred Senators (there were ninety-six before admission of Alaska and Hawaii as states) and the Senate has sixteen standing committees.

Yet during the 85th Congress the work-load of the Senate Judiciary Committee comprised more than 40 per cent of all Senate bills and reso-

lutions introduced, more than 46 per cent of all House bills and resolutions passed by that body and presented in the Senate, and more than 41 per cent of all bills and resolutions considered by the Senate, irrespective of origin.

This was not an unusually high work-load, in terms of percentages. As a matter of fact, it was the lowest percentage of total Senate business which had been handled by the Senate Judiciary Committee in five Congresses.

Not only does the Judiciary Committee receive a far larger share of the Senate's total work-load than any other standing committee of the Senate; it has also performed consistently a larger share of all committee work than any other committee. For example, in the 85th Congress, the Judiciary Committee filed 1,195 reports on legislation, which represented more than 47 per cent of all reports filed with the Senate by all its committees.

The total number of reports filed with the Senate does not give an adequate picture of committee activity, of course, because committee consideration of many bills resulted in adverse action and indefinite postponement, with no report going to the Senate.

Furthermore, the committee handled and disposed of more than 1,815 individual immigration cases, involving suspension of deportation, ninety-two cases involving adjustment of status under the Displaced Persons Act, and 1,869 cases involving adjustment of status under section 6 of the Refugee Relief Act.

Each of these cases is equivalent to a bill in the amount of work required to handle it, though usually many such cases will be covered in a single bill when reported to the Senate. Each case requires individual investigation and review at the staff level, followed by briefing of committee members and exercise of committee judgment.

In addition, there are numerous instances under the immigration laws where the Attorney General is granted discretionary authority to waive certain provisions of the law, but is required to submit detailed reports to the Congress. In many instances, the Attorney General's action is final, or becomes so, only if the Congress does not disapprove during the session within which the case is submitted. During the 85th Congress, there were submitted to the Judiciary Committee 3,857 cases of this nature. It was the responsibility of the committee to check each one of these reported cases to be sure that the Attorney General's discretion was exercised in conformity with the intent of the Congress.

Statistics respecting the number of cases in which the committee disagreed with the Attorney General, or overrode his action, would serve no good purpose here; but it is in the nature of an independent review, which the Judiciary Committee affords, that agreement would not be accorded in every case.

Jurisdiction of all Senate committees is fixed by the Legislative Reorganization Act enacted in 1946. The jurisdiction of the Committee on the Judiciary is defined as follows:

“(k) Committee on the Judiciary, to consist of fifteen Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

1. Judicial proceedings, civil and criminal, generally.
2. Constitutional amendments.
3. Federal courts and judges.
4. Local courts in the Territories and possessions.
5. Revision and codification of the statutes of the United States.
6. National Penitentiaries.
7. Protection of trade and commerce against unlawful restraints and monopolies.
8. Holidays and celebrations.
9. Bankruptcy, mutiny, espionage, and counterfeiting.
10. State and Territorial boundary lines.
11. Meetings of Congress, attendance of Members, and their acceptance of incompatible offices.
12. Civil liberties.
13. Patents, copyrights, and trade-marks.
14. Patent Office.
15. Immigration and naturalization.
16. Apportionment of Representatives.
17. Measures relating to claims against the United States.
18. Interstate compacts generally.”

This list is only a skeleton outline of the committee's jurisdiction.

Examples of how this skeleton “fleshes out” can be multiplied indefinitely.

Thus, “judicial proceedings” include not only such matters as approval of the Uniform Rules of Criminal Procedure and the Uniform Rules of Civil Procedure, for the federal courts, but also provisions respecting habeas corpus, venue of claims against public carriers, and many, many other items.

“Constitutional amendments” range from the subject of equal rights for women to the question of the Presidential succession.

The Judiciary Committee's jurisdiction over “national peniten-

tiaries" includes responsibility for "legislative oversight" of the administration and operation of the various federal penal institutions; and in the discharge of this responsibility, at least one member of the committee must make numerous visits to these institutions during the course of each year.

"Holidays and celebrations" include such important resolutions as that providing for "Captive Nations Week," as well as relatively unimportant resolutions such as those authorizing federal participation in local celebrations.

One of the large categories of bills handled by the Senate Judiciary Committee are the so-called "private relief bills," each designed to grant some benefit or relief to a private individual. In this class are included also bills for the relief of states or cities, or other municipal subdivisions, for corporations or other artificial persons, and for various groups and associations. Sometimes the amounts involved are small; sometimes they become quite large. In the 85th Congress, the Judiciary Committee considered 619 private relief bills, of which 395 were acted upon favorably, and 224 were indefinitely postponed.

The committee's jurisdiction over federal courts and judges includes the task of screening and recommending confirmation or rejection for all judicial nominees and all nominees for positions as United States attorney; also all positions in the Justice Department which are filled by Presidential appointment.

Each nomination considered by the committee is the subject of a separate hearing, usually before an *ad hoc* subcommittee appointed for that particular purpose. Some idea of the volume of work involved in passing upon nominations can be gained from a look at the nomination work-load of the committee during the last Congress. In the two sessions of the 85th Congress, the Judiciary Committee received 247 executive nominations. Fifty of these were for federal judges. Eighty-eight were United States attorneys, and eighty-one were United States marshals. Two were nominations to be Associate Justice of the United States. One was a nomination to be Attorney General of the United States. One was a nomination to be Deputy Attorney General. One was a nomination to be Solicitor General of the United States. Four were nominations to be Assistant Attorney General. One was a nomination to be Assistant Commissioner of Patents. Two were nominations for the position of Examiner in Chief in the Patent Office. Three were nominations to membership on the Subversive Activities Control Board. Five were nominations to membership on the Federal Parole Board. Six were nominations to membership on the Commission on Civil Rights. One was the nomination as Staff Director of the Commission on Civil Rights. One was a nomination to membership on the Foreign Claims Settlement

Commission. Of these 247 nominations, the Committee handled and disposed of all but ten before the end of the 85th Congress.

Prior to enactment of the Legislative Reorganization Act in 1946, most Senate investigations were conducted by special or select committees, named for the purpose. While one or two such committees have been created for particular purposes since the enactment of the Legislative Reorganization Act, most investigations are now conducted by subcommittees of the regular standing committees. The Judiciary Committee of the Senate operates during the present session with twelve investigating subcommittees, which for the current fiscal year have an aggregate of \$1,432,500 in appropriations for their work. Combined staffs of these subcommittees and of the Judiciary Committee itself number more than 140 persons.

Some of the more important subcommittees of the Committee on the Judiciary are the Subcommittee on Immigration and Naturalization, the Subcommittee on Administrative Practice and Procedure, the Anti-trust and Monopoly Subcommittee, the Subcommittee on Constitutional Rights, the Subcommittee on Patents, Trademarks, and Copyrights, and the Internal Security Subcommittee.

The Internal Security Subcommittee of the Committee on the Judiciary was created in 1950. Its first major investigation concerned the Institute of Pacific Relations, and exposed the inner-workings of the conspiracy by which the Communists had sought (with very considerable success) to gain control over "expert" thinking with respect to the Far East, especially China, as a means for diverting public opinion, and eventually, American foreign policy, in directions favorable to Communist objectives. The Internal Security Subcommittee has also engaged in a number of other major investigations, including the investigation of interlocking subversion in the Executive Branch of the federal government and the uncovering of Communist activity in the field of mass communications, in labor unions, and in education. A number of Internal Security Subcommittee monographs have become best sellers at the Government Printing Office, among them *The Communist Party of the United States of America—What It Is, How It Works—A Handbook for Americans*, *Soviet Political Agreements and Results*, *The Revival of the Communist International and Its Significance for the United States*, and *Contradictions of Communism*.

But for all its investigative work, the Judiciary Committee is primarily a legislative body. It is a major organ of the upper house of the United States Congress: a body of fifteen Senators out of one hundred, who do, in this one committee, almost half of the Senate's work!

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXIII

MAY 1962

NUMBER 3

THE LAW JOURNAL EDITORIAL BOARD

JOHN R. BRADLEY, JR.
Editor-in-Chief

L. F. SAMS, JR.
Assistant Editor

WILLIAM TIMOTHY JONES
Article Editor

JOHN M. ROACH
Index and Review Editor

JOHN H. HOGUE, JR.
Casenote Editor

JAMES KEARNEY TRAVIS, JR.
Research Editor

HARRY L. CASE, JR.
Comment Editor

VERNON L. TERRELL, JR.
Business Manager

ROBERT K. RUSHING
Faculty Advisor

THE LAW JOURNAL STAFF

Neal Brooks Biggers

Richard M. Edmonson

James Thomas Caldwell

Arnold F. Gwin

John H. Cheatham III

Paul Tudor Jones V

Lloyd G. Spivey, Jr.

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

Student Comments

CLAIMANT'S DUTY TO SUBMIT TO SURGERY IN MITIGATION OF RECOVERY UNDER WORKMEN'S COMPENSATION

I. INTRODUCTION

One of the most delicate problems in the entire field of workmen's compensation is the question of whether a claimant must submit himself to surgery for the purpose of improving his condition and thus mitigating his recovery under the Workmen's Compensation Act.¹ According to the act, an employer must provide necessary services, treatment and equipment "for such period as the nature of the injury or the process of recovery may require."² It further provides that if the employee "unreasonably refuses to submit to medical or surgical treatment (offered by the employer), the commission shall, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension."³ The law is stated easily enough, but difficulty arises in its application. When is a refusal to submit to a proffered operation unreasonable? This is the source of irritation which has resulted in a wealth of litigation over the years. The purpose of this paper is to set forth the mechanics of the Mississippi law in this area and the various rules applied and many factors considered by the courts in determining whether compensation shall be suspended because of an injured employee's refusal to submit to surgery.

II. COMPARISON OF TORT AND WORKMEN'S COMPENSATION RULES

Because of the similarity of the tort and workmen's compensation rules on submission to surgery in mitigation of damages, it is necessary to compare and distinguish the application of the rules in those areas. The general rule under the workmen's compensation law is that an injured employee who unreasonably refuses to submit to surgery will be denied compensation for such disability as may be removed or modified by an operation of a simple character, not involving serious suffering or danger. Where the operation is of a major character, involving serious suffering or danger, or where success is doubtful, compensation is not precluded by the employee's "reasonable" refusal of surgery.⁴ A similarly stated rule is applied in tort cases dealing with the duty to

¹MISS. CODE ANN. § 6998-01 to -59 (1956).

²MISS. CODE ANN. § 6998-08 (a) (1956).

³*Ibid.*

⁴*E.g.*, Walker v. International Paper Co., 230 Miss. 95, 92 So. 2d 445 (1957).

minimize recovery by surgery.⁵ The tort rule, commonly referred to as the doctrine of avoidable consequences, places a duty upon a person injured through the fault of another to submit himself to reasonable care and treatment, and recovery is not allowed for any suffering or disability which could thus have been avoided.⁶ The duty referred to is not an affirmative duty in the legal sense, because the claimant or plaintiff is not required to respond in damages for failure to minimize recovery by submitting to surgery.

Though the tort rule is similar in statement to the workmen's compensation rule, the two are decidedly different in application. One eminent legal writer suggests that a major difference between the two classes of cases is that a more subjective application of the rule is usually found in workmen's compensation cases.⁷ For example, in a tort action if the plaintiff refuses to submit to an operation because of his fear of surgery and anesthetics the rule would be satisfied only if the court finds that a reasonable man would have feared the same operation.⁸ On the other hand, under workmen's compensation the requirement would generally be satisfied if the court finds that the claimant actually refused because he genuinely feared the operation.⁹ The foregoing distinction holds true generally, but in some instances the courts apply the same rules and consider the same factors in both classes of cases.

The workmen's compensation claimant, whose injury in most cases is not caused by the fault of the employer, is under no affirmative duty to submit himself to surgery, and no such duty arises until the employer has offered treatment to the employee.¹⁰ A plaintiff, however, claiming damages for personal injury caused by the defendant's wrongdoing, is under a duty to exercise reasonable care in procuring medical treatment, regardless of whether such treatment is offered by the defendant.¹¹ Logically, the tort plaintiff should be under no greater duty than the workmen's compensation claimant (no affirmative duty until surgery is offered),¹² and, for lack of sound reason for difference, the rule for the two classes of cases should be the same.

The Mississippi Workmen's Compensation Law further states that an injured employee who seeks treatment "shall not be entitled to recover any amount expended by him for such treatment or services,

⁵See, e.g., *Birmingham Ry., Light & Power Co. v. Anderson*, 163 Ala. 72, 50 So. 1021 (1909).

⁶McCORMICK, *DAMAGES* 136 (1st ed. 1935).

⁷Ludlam, *Plaintiff's Duty to Minimize Defendant's Liability by Surgery*, 17 TENN. L. REV. 821, 823 (1943).

⁸*Ibid.*

⁹*Ibid.*

¹⁰See MISS. CODE ANN. § 6998-08 (1956).

¹¹*Ouillet v. Sheerin*, 297 Mass. 536, 9 N.E.2d 713 (1937).

¹²MISS. CODE ANN. § 6998-08 (1956).

except in emergency cases, unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so."¹³ Thus, not only is an injured employee not under an affirmative duty to submit to necessary medical treatment, including surgery, in minimizing his recovery, but, should he undertake such treatment at his own expense, he would not be entitled to recover the cost of that treatment unless he had first requested his employer to provide it and had been refused. It is not suggested, however, that the tort and workmen's compensation rules should be similar in this respect.

III. PROCEDURE UNDER THE MISSISSIPPI STATUTE

The Mississippi statute has been touched upon in part in previous discussion in this comment, and will, of necessity, be mentioned again as the topic is developed. A brief examination of procedure under the Mississippi Workmen's Compensation Law regarding an injured employee's duty to submit to surgery would seem helpful at this point.

If an injured employee makes a request for medical or surgical treatment and the employer refuses to provide same, the employee can recover any amount he expends for this purpose. This is true only in emergency cases where the employee has first requested that the employer provide treatment and the employer has refused. A claim by the employee shall not be enforceable against the employer unless the treating physician, within twenty days, furnishes the employer and the Commission with a report prepared on the proper form,¹⁵ but the Commission may overlook this twenty day period if it finds it to be in the interest of justice to do so.¹⁶

"The employer shall furnish" medical or surgical treatment, equipment, nursing, and hospital care for the necessary period, such period being dictated by the type and seriousness of the injury.¹⁷ If the employee refuses to submit to surgery, and the employer feels that this refusal is unreasonable, application can be made by the employer to the Workmen's Compensation Commission, whereupon it shall either order a hearing or dispose of the case by awarding or denying compensation.¹⁸ If the Commission deems it necessary, an investigation may be made before a decision is reached.¹⁹ If a hearing is ordered before a duly designated representative of the Commission, the representative shall file his decision, making or denying the award, in the office of the Com-

¹³MISS. CODE ANN. § 6998-08 (a) (1956).

¹⁴*Ibid.*

¹⁵*Ibid.*

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸MISS. CODE ANN. § 6998-24 (1956).

¹⁹*Ibid.*

mission.²⁰ Within twenty days after this decision, if review by the full Commission is desired, a request or petition for review must be filed.²¹ Appeal from the final award of the commission must be made to the circuit court of the county in which the injury occurred, and from there appeal is to the supreme court.²²

In order to insure protection of the employee, the act specifically provides that no suspension of payments shall be made for refusal to submit to surgery unless the reasonableness of that refusal has first been determined by the Commission and an order issued authorizing such suspensions.²³ Separate provisions are made in the field of hernia injuries which constitutes a large portion of the refusal cases, but these provisions will be dealt with under a subsequent heading.

In workmen's compensation cases, it is generally held that an employee's refusal or failure to undergo corrective surgery cannot be the basis for suspending or reducing compensation if the employer has not tendered an operation prior to a decision by the Commission.²⁴ This is not to imply that an offer of treatment prior to a decision by the Commission will serve as basis for suspension in all cases. One decision, submitted as reaching the only logical result, held that an employer could not delay too long—four years in this case—after injury, and then require an injured employee to submit to a proffered operation as a condition to receiving compensation.²⁵

Generally, under the workmen's compensation law providing for forfeiture of compensation for disability caused by an unreasonable refusal to submit to surgery, forfeiture of all compensation is not authorized; only that compensation to which the employee concededly would have been entitled if he had submitted to the operation is forfeited.²⁶

IV. DETERMINATION OF REASONABLENESS

As previously stated, a claimant must submit to surgery in order to be compensated when refusal would be unreasonable, and whether a refusal is unreasonable is a question of fact to be determined by the Workmen's Compensation Commission. The power given the Commission by the Workmen's Compensation Law to determine whether an injured employee's refusal is reasonable is judicial in its nature and can

²⁰*Ibid.*

²¹*Ibid.*

²²MISS. CODE ANN. § 6998-06 (1956).

²³MISS. CODE ANN. § 6998-19 (1956).

²⁴*E.g.*, Texas Employer's Ins. Ass'n v. Kubiak, 276 S.W.2d 909 (Tex. Cir. App. 1955).

²⁵Lawson v. Harlan Williams Coal Corp., 253 S.W.2d 860 (Ky. Ct. App. 1952).

²⁶See, *e.g.*, Wood v. Wagner Elec. Corp., 192 S.W.2d 579 (Mo. Ct. App. 1946).

be exercised by the Commission only after hearing and consideration of all the evidence.²⁷

The risk of death involved in surgery is probably the most frequent factor considered in determining whether refusal is reasonable. It is generally held that the Commission does not have jurisdiction to order an injured employee to submit to a major operation in which there is "a risk of life, however slight, merely for the purpose of minimizing the pecuniary obligation created by law in his favor against his employer."²⁸ Where there is no showing that a proffered operation is not "fraught with danger" to claimant's life, his refusal to submit to an operation is not unreasonable.²⁹ However, where operations are shown not to be dangerous to life, a refusal to submit will often result in reduction in claimant's compensation.³⁰ One court recently reached the result that refusal was unreasonable by considering the slight degree of risk to life involved along with its reasoning that a total invalid could not become more than totally disabled even if no favorable result obtained from the operation.³¹ Advanced age and poor physical condition may cause an otherwise unreasonable refusal to be classified as reasonable.³² Such was the case where, among other things, claimant had a coronary disease.³³ Thus, the mortality rate, along with claimant's age and physical condition, which should certainly be considered, plays an important part in the court's determination of reasonableness.

Probable success of the proposed operation, including the possibility of further injury resulting therefrom, is also one of the principal considerations in deciding whether refusal is unreasonable. An example is the case wherein a claimant refused to undergo an operation for amputation of his index finger, and the court, upon finding that the proposed surgery would not be successful in rehabilitating the employee for his previous occupation, held his refusal not unreasonable.³⁴ Medical statistics relating to the success of particular types of operations will carry some weight but are not necessarily controlling.³⁵ Where chance of rehabilitation is small, refusal to submit has been held not unreasonable,³⁶ and, in an unusual decision, where possibility of success was shown to be great, a slight risk of death led the court to the conclusion

²⁷*Liberty Mut. Ins. Co. v. Thrower*, 76 Ga. 275, 45 S.E.2d 459 (1947).

²⁸*Williams & Copeland, Inc. v. Calvin*, 207 Okla. 281, 249 P.2d 414 (1952).

²⁹*Dyer v. General Motors Corp.*, 318 Mich. 216, 27 N.W.2d 533 (1947).

³⁰*Fowler v. W. G. Constr. Co.*, 51 N.M. 441, 188 P.2d 160 (1947).

³¹*Hays v. Industrial Comm'n*, 138 Colo. 334, 333 P.2d 160 (1947).

³²See, e.g., *Lampman v. Leonard Hosp.*, 280 App. Div. 1028, 116 N.Y.S.2d 826 (1952).

³³*Dudansky v. L. H. Sault Constr. Co.*, 244 Minn. 369, 70 N.W.2d 114 (1955).

³⁴*Borders v. Lumbermen's Mut. Cas. Co.*, 90 So. 2d 409 (La. Ct. App. 1956).

³⁵See DUNN, *MISSISSIPPI WORKMEN'S COMPENSATION* § 214 (Supp. 1960).

³⁶*Pruszenski v. Edo Aircraft Corp.*, 275 App. Div. 1015, 91 N.Y.S.2d 684 (1949).

that refusal was not unreasonable.³⁷ Although there is disagreement as to the degree of certainty required to render a refusal unreasonable, substantially all courts agree that some prospect of success must be present in the proposed surgery.³⁸ This appears only logical, since it would be foolish to require a claimant to submit to an operation simply on the basis of its classification as minor surgery, without also requiring some assurance of a successful restoration of the employee's prior industrial capacity.

The degree of success required would be more standardized under the following suggestion:

It is submitted that the success required should vary directly with the risk involved. If the risk of death from the operation is high, but not high enough to refuse the operation, the court might permit its requirement of success to fall accordingly. No tribunal applies such a rule at present. Probably the courts do not wish to adopt a rule which would require the technical comparison of risk and success.³⁹

Claimant's previous surgical experience is also to be considered in this area.⁴⁰ Where an injured employee is shown to have had previous experiences with unsuccessful operations on other parts of his body, his refusal of a proposed operation is generally not unreasonable.⁴¹

An injured workman's unfounded fear is accorded little weight in the court's determination. Where the court finds that a claimant's fear of danger is unfounded, there is justification for suspension of compensation,⁴² but where refusal is prompted by a genuine fear the courts say justification for suspension of compensation is lacking.⁴³ An unfounded fear would probably be an unreasonable fear, but how can a court determine whether a fear is genuine? It is submitted that fear should not be considered at all, because in the absence of fear, the claimant, in most cases, would not refuse an operation when first offered. Decision should be based simply on the severity of the surgery involved. To add further difficulty, there is a group of decisions dealing with refusal based upon religious belief. Such refusals have generally been held unreasonable, though claimant is sincere in his belief that a cure could be effected through his faith.⁴⁴ In these cases, the court will look to the type of

³⁷Walker v. International Paper Co., 230 Miss. 95, 92 So. 2d 445 (1957).

³⁸See, e.g., Joliet Motor Co. v. Industrial Bd., 280 Ill. 148, 117 N.E. 423 (1917).

³⁹LUDLAM, *op. cit. supra* note 7, at 828.

⁴⁰DUNN, *op. cit. supra* note 35, § 214.

⁴¹Cate v. M. S. Perkins Mach. Co., 102 N.H. 391, 157 A.2d 778 (1960).

⁴²Wardlaw v. J. G. Ridgeway Constr. Co., 212 S.C. 116, 46 S.E.2d 662 (1948).

⁴³Stewart v. Board of Public Instruction, 102 So. 2d 821 (Fla. Dist. Ct. App. 1958).

⁴⁴E.g., Martin v. Industrial Acc. Comm'n, 147 Cal. App. 2d 137, 304 P.2d 828 (1956).

operation, consider all the other factors, and make its decision without regard to the claimant's religious beliefs. Accordingly, a refusal by a Christian Scientist was held by the California Commission to be unreasonable on the basis of its classification as a minor operation.⁴⁵

Though risk of death from anesthesia is often mentioned, along with other factors, in decisions on this problem, courts generally hold that such risk is not sufficient to excuse claimant's continued refusal to undergo surgery.⁴⁶

Inability or failure to understand the doctor's instructions as to the necessity of an operation, whether such failure or inability is due to a language barrier or severe pain destroying comprehension, will prevent the claimant's refusal from being termed unreasonable.⁴⁷ In a case in which the claimant was not fully informed of the dire consequences of his refusal (possible death from an aggravation of the injury or possible reduction in compensation for unreasonable refusal), and subsequently died from his injury, the court held that in order for the employee's refusal of necessary surgery to be a bar to compensation, it must clearly appear that the urgency and necessity of surgery were made known to the employee at a time when he was physically and mentally capable of making a responsible and intelligent choice.⁴⁸

Though most courts will consider probable pain and suffering following surgery in determining the reasonableness of an injured workman's refusal, *extraordinary* pain and suffering is generally required before it will render the refusal reasonable.⁴⁹ "Extraordinary" has been said to mean more than the ordinary pain and suffering attendant with the usual operation.⁵⁰ Rarely, though, is pain and suffering, without more, the determining factor. A claimant's desire to avoid physical disfigurement has been held sufficient to make refusal reasonable. An example here is the case in which a suggested operation was for amputation of injured fingers. Though refusal of surgery resulted in subsequent loss of surrounding fingers, the court held that the claimant was entitled to compensation on the ground that his refusal to submit to amputation when it first became necessary was a reasonable refusal.⁵¹ The writer feels that fear of disfigurement as a basis for determining reasonableness is going too far. It is submitted that unless the claimant can show that a physician advised him against an operation, or there is a genuine risk to life, his refusal should be found unreasonable. A

⁴⁵*Marlar v. Rosenberg Bros. & Co.*, 20 Cal. Indus. Acc. Comm. Dec. 35 (1934).

⁴⁶*Duplechien v. States Exploration Co.*, 95 So. 2d 460 (La. Ct. App. 1957).

⁴⁷*Jendrus v. Detroit Steel Prods. Co.*, 178 Mich. 265, 144 N.W. 563 (1913).

⁴⁸*Flemming v. St. Paul-Mercury Indem. Co.*, 91 Ga. App. 582, 86 S.E.2d 637 (1955).

⁴⁹*Dyer v. General Motors Corp.*, 318 Mich. 216, 27 N.W.2d 533 (1947).

⁵⁰*E.g., King v. City of St. Louis*, 155 S.W.2d 557 (Mo. Ct. App. 1941).

⁵¹*Enterprise Fence & Foundry Co. v. Majors*, 68 Ind. App. 575, 121 N.E. 6 (1918).

mere hope that he can get by without further damage or without an operation certainly should not lead to a decision for the claimant when the condition can be improved by minor surgery.

V. MEDICAL OPINION

The advice of doctors often plays an important part in a claimant's decision, and a conflict in medical opinion poses particular problems. If a physician has advised an employee against having an operation, it would be proper to assume that the court, in the absence of medical testimony to the contrary, would not consider claimant's refusal to be unreasonable. Sometimes, a doctor will recommend surgery but will not guarantee beneficial results. Even though the suggested operation was not accompanied by risk, one court has held that without this guarantee of beneficial result, the claimant was not acting unreasonably in refusing to undergo the recommended surgery.⁵²

Where doctors disagree as to the probable success of an operation, the trend of decisions appears to be that a refusal to submit to an operation on which there is a conflict of opinion is not unreasonable.⁵³ But where medical statistics and the weight of medical testimony favor the operation, the issue is not automatically determined in favor of the employer.⁵⁴ The surgeon, who views numerous operations and who testifies, for example, that possibility of fatality is only "five per cent," naturally has a different point of view from the claimant who has never undergone a major operation and, quite understandably, might prefer to live with his injury as best he can rather than subject himself to a one-in-twenty chance of loss of life.⁵⁵ Thus, it is clearly demonstrated that an injured employee will receive the benefit of any doubt or conflict that arises as to the reasonableness of a proposed operation. Where there is a difference of expert medical opinion as to whether an operation will be attended with serious risk, or as to the probable result or the advisability of an operation, an injured employee is generally under no duty to submit thereto, and his refusal to do so is not unreasonable.⁵⁶

A typical case is one in which a claimant with an injured arm was requested to undergo corrective surgery tendered by his employer. The claimant was not given any assurance of success of the operation, and, more important, he was faced with a strong disagreement between the medical consultants as to the necessity of the operation. On the basis of these facts, the court found that the injured employee's refusal was

⁵²*Grant v. Indiana Acc. Comm'n*, 102 Ore. 26, 201 Pac. 438 (1921).

⁵³See 2 SCHNEIDER, *WORKMEN'S COMPENSATION* § 496 (2d ed. 1932).

⁵⁴LARSON, *WORKMEN'S COMPENSATION* § 13, 22 (1952).

⁵⁵*Ibid.*

⁵⁶See *ANNOT.*, 105 A.L.R. 1470 (1939).

not unreasonable.⁵⁷ Another example is the case in which a claimant refused to submit to surgery to correct a varicocele condition of the scrotum. In view of the difference of medical opinion as to the degree of danger involved, the court found that claimant's refusal was not unreasonable.⁵⁸ Where one physician advised against surgery, another recommended a particular type of operation and a third doctor advised that a different type would be successful, the employee's refusal was not unreasonable and his recovery was not precluded or reduced.⁵⁹ However, it has been held that a claimant's refusal is unreasonable where there is only a slight conflict in medical evidence relating to the reasonableness of recommended surgery.⁶⁰ Readily apparent is the fact that where there is such a conflict, the courts generally strain to resolve it in favor of the claimant.

VI. CATEGORIZED OPERATIONS—MAJOR OR MINOR

It is evident from numerous cases in this field that through the years the courts have come to treat certain types of operations as major or minor, for workmen's compensation purposes, almost without reference to the usual factors considered and without considering an obvious classification. An example of this categorizing can be demonstrated by the court's treatment of an operation to correct a hernia.

In some cases hernia is styled a major operation, and it is probably so accepted by the medical profession generally. However, it is an exception to the general rule in regard to major operations, because the technique of the operation follows along such well-established lines, and the danger of infection and loss of life has been reduced to such a small percentage, together with the fact that so long as the employee is not operated upon he is for many kinds of work entirely disabled, and after a successful operation he is restored to practically the same condition as before; therefore the courts have generally ruled on a hernia operation as if it were a minor operation.⁶¹

One state, Louisiana, has been extremely reluctant to compel an injured employee, either by suspension or refusal of the right to compensation, to submit to a hernia operation,⁶² preferring to leave the choice of submission to the discretion of the claimant, even where it is apparent that the operation would not be of a serious or dangerous nature, and is one from which recovery is generally assured.⁶³ The Workmen's

⁵⁷*Benefield v. Zach Brooks Drilling Co.*, 59 So. 2d 710 (La. Ct. App. 1952).

⁵⁸*United Elec. Coal Co. v. Adams*, 299 S.W.2d 246 (Ky. Ct. App. 1956).

⁵⁹*Rouse v. Globe Indem. Co.*, 65 So. 2d 369 (La. Ct. App. 1953).

⁶⁰*Foutz v. Phelps Dodge Corp.*, 72 Ariz. 350, 236 P.2d 42 (1951).

⁶¹*Simmerman v. Felthausen*, 125 Neb. 795, 251 N.W. 831 (1934).

⁶²*ANNOT.*, 105 A.L.R. 1470 (1939).

⁶³*E.g., Smith v. Mitchell*, 88 So. 2d 472 (La. Ct. App. 1956).

Compensation Act of Louisiana contains no requirement that an injured workman submit to an operation in order to recover compensation. It does appear, however, that, excluding hernia cases, an employee in that state cannot unreasonably refuse to undergo an operation which is minor or simple in nature and retain his right to compensation.⁶⁴

Mississippi has provided by statute for disposition of hernia cases.

In case the employee shall refuse to permit . . . (a hernia) operation, it shall be the duty of the employer to provide all necessary first aid, medical and hospital care and services, and to supply the proper and necessary truss or other mechanical appliance to enable said employee to resume work, and shall further pay compensation . . . (at temporary total disability rate) not exceeding, however, the period of thirteen (13) weeks.⁶⁵

This statute has apparently placed hernia operations in the class of minor surgery insofar as compensation is concerned. Though compensation is not suspended entirely for refusal to submit to surgery, a claimant suffering from hernia is limited to thirteen weeks of compensation at two-thirds of his average weekly wage. Generally, if a claimant is permanently disabled with some other condition he will be entitled to recover two-thirds of his average weekly wage for a period not exceeding 450 weeks or an amount of \$12,500.⁶⁶ Therefore, a claimant who refuses to submit to surgery to correct a hernia is treated rather severely compared to those suffering from most other types of injuries. The statute does not treat the operation as minor and the refusal as unreasonable if death results from the hernia within a period of one year. Such death would result in compensation to the family of the deceased at the same rate provided where death results from any other cause.⁶⁷

Another operation that has apparently been generally categorized without regard to ordinary classifications is the intervertebral disc operation, refusal of which is generally deemed reasonable. *Walker v. International Paper Co.*⁶⁸ is the only Mississippi case reported to date on intervertebral disc injury. It is also the only reported Mississippi workmen's compensation case to date dealing with the duty to submit to surgery in mitigation of recovery.

The claimant in the *Walker* case received a back injury while in the scope of employment. Injury resulted when claimant was struck in the back by a piece of pulpwood which fell from a truck he was unloading. After being compensated for temporary total disability for a

⁶⁴*Clements v. Liberty Mut. Ins. Co.*, 85 So. 2d 675 (La. Ct. App. 1956).

⁶⁵MISS. CODE ANN. § 6998-12 (Supp. 1960).

⁶⁶MISS. CODE ANN. § 6998-11 (Supp. 1960).

⁶⁷MISS. CODE ANN. § 6998-12 (Supp. 1960).

⁶⁸230 Miss. 95, 92 So. 2d 445 (1957).

year, the employee returned to work but immediately discovered that he was unable to continue. An orthopedic surgeon advised that he undergo corrective surgery calculated to substantially improve his condition, which was diagnosed as a herniated intervertebral disc. Claimant refused. On the allegation that claimant unreasonably refused to undergo the suggested operation, the attorney referee heard the case and found that claimant's refusal was not unreasonable. This decision was affirmed by the Workmen's Compensation Commission but was reversed by the circuit court, which held that compensation should be suspended due to the claimant's unreasonable refusal to submit to surgery.

Medical testimony by one doctor as to the seriousness of the operation was that ninety percent of the operations for intervertebral disc injuries have favorable results. Another doctor testified that the proposed operation was no more serious than an appendectomy, that the mortality rate was only about one to one and a half percent, and that claimant would never be able to return to work in his present condition. There was additional testimony to the effect that a large proportion of disc surgery cases return to their former occupations after the operation. While the evidence indicated that disc surgery was minor and safe, the Mississippi Supreme Court determined that the claimant's refusal was not unreasonable. In reaching its decision, the court looked to the refusal of the doctors to guarantee success of the operation, the existence of a chance—though small—of fatality attendant with such operation and other decisions holding that refusal of disc operations was not unreasonable. In the view of the court, the employer failed to meet the burden of proving that the proposed operation was minor and simple. It is also conceivable that the court felt some sympathy for the claimant, who, in obvious reference to those suggesting submission to the operation, declared, "It ain't their back." The case is not unlike many others on this point.

Though the usual factors will have some bearing on the decision of the court, the general rule is that a refusal to undergo an intervertebral disc operation will not be considered unreasonable, and the employee will not be required to submit to such operation under penalty of termination of compensation.⁶⁹ However, a refusal of an exploratory back operation followed by a spinal fusion has been found to be unreasonable due to the fact that doctors recommended such surgery.⁷¹ In keeping with the general rule that refusal is reasonable in the area of disc and back injuries, it has been held that claimant was justified in refusing to submit to a myelogram test to determine the nature of back

⁶⁹*E.g.*, *United States Coal & Coke Co. v. Lloyd*, 305 Ky. 105, 203 S.W.2d 47 (1947).

⁷⁰*Sec. e.g.*, *Mancini v. Superior Court*, 78 R.I. 373, 82 A.2d 390 (1951).

⁷¹*Acquarulo v. Botwinik Bros.*, 139 Conn. 684, 96 A.2d 752 (1953).

pains and headaches.⁷² A myelogram test consists of penetrating the tissue with a needle inserted into the spinal canal and injecting a solution of oil and iodine, which casts a shadow on an X-ray plate, then, tilting the patient, taking the pictures with the needle in place, and then withdrawing the oil and removing the needle. Since this process does not actually amount to surgery, but is merely a test for the purpose of determining the feasibility or necessity of surgery, a finding that refusal to submit to such a test is reasonable is further indication of liberality toward the employee in the area of spine and back injuries.

Still another area in which the courts have overlooked the ordinary classifications of surgery as major or minor is in determining whether a claimant must submit to a second operation in reducing or minimizing his compensation. The general view is illustrated by a few decisions in this area.

Where an employee had undergone one unsuccessful operation on his knee, he was not unreasonable in refusing to submit to a second operation for the same purpose, although advised by three physicians that he should undergo the proposed surgery.⁷³ A knee operation would ordinarily be considered simple and safe—and probably was in this case—but the fact that the proposed surgery would be the second operation on the same knee obviously served to prevent claimant's refusal from being unreasonable.

In a case involving proposed surgery to correct a hernia—an operation to which, as has been illustrated, courts ordinarily require submission at penalty of loss of compensation—the court held that an injured employee could not be required to submit to a second operation for the same hernia.⁷⁴ The court viewed a requirement of submission to a second operation as in itself unreasonable and unsafe. Another hernia decision accordingly stated that a claimant is entitled to compensation without regard to whether a second operation would be more than ordinarily unsafe.⁷⁵

The prevailing view, as demonstrated, is that while refusal by a person in ordinary health to undergo one operation might be termed unreasonable, a refusal to undergo another should not be considered unreasonable, where there has previously been one unsuccessful operation for the same purpose.⁷⁶

Since the Mississippi Workmen's Compensation Law contains no specific provision regarding second operations after previous unsuccessful ones, it may be presumed that Mississippi would follow the general rule and refuse to require the claimant to submit to further surgery. An infer-

⁷²Hartford Acc. & Indem. Co. v. Barfield, 89 Ga. App. 562, 80 S.E.2d 84 (1954).

⁷³Pioneer Coal Co. v. Sparks, 249 S.W.2d 725 (Ky. Ct. App. 1952).

⁷⁴Greeneville Cabinet Co. v. Ramsay, 195 Tenn. 409, 260 S.W.2d 157 (1953).

⁷⁵City of Olive Hill v. Parsons, 306 Ky. 83, 206 S.W.2d 41 (1947).

⁷⁶E.g., Crawford v. Tampa Inter-Ocean S.S. Co., 155 So. 409 (La. Ct. App. 1924).

ence which may lead to such a result may be drawn from that portion of the Mississippi Workmen's Compensation Law relating to operations for hernia.⁷⁷ In referring to the employee's duty to submit to surgery, the statute refers singularly to a refusal of "such operation."⁷⁸ From this, one might conclude that the intention was not to require a claimant to submit to a second operation in cases of hernia or rupture. If the wording of the statute is construed as contemplating only one operation, continued disability after one unsuccessful operation should be a ground for an award of compensation for any remaining disability without requiring the claimant to submit to further surgery.

VII. CONCLUSION

The term "unreasonable" is indeed difficult to apply as a standard when attempting to describe or categorize an injured employee's refusal to submit to surgery. Determination of reasonableness can be very ticklish, especially when attempting to decide whether a man who exclaims, "It ain't their back."⁷⁹ is being arbitrary or unreasonable in refusing to undergo surgery on his spinal column.

It is submitted that the sole determining factor in granting, reducing or denying compensation should be whether the suggested operation is major and serious or minor and simple, rather than whether refusal is "reasonable," a term which suggests a broader scope of interpretation. Reasonableness, as has been pointed out, is generally based on a classification of surgery as major or minor. True, the test of reasonableness leaves some degree of latitude and discretion in the ultimate decision of the commission or court, but such latitude leads to inconsistent results. With the determination based on whether an operation is major or minor, and with a board of medical examiners or consultants, competent in their field, called to assist in such cases or a standardized form submitted to several doctors qualified in the field involved, these inconsistencies could probably be reduced considerably. Following a space for stating information relating to the particular claimant, this proposed form would solicit opinion and statistics on the various factors generally used by the courts. Then, he could be requested to include his opinion as to whether the proposed surgery is major or minor. With these forms the commission would then determine whether compensation should be granted, reduced or denied, and in the event of conflict of medical opinion the question should be resolved, as it presently is, in favor of the employee. The foregoing suggestion would place the determination where it should be—primarily in the hands of several

⁷⁷MISS. CODE ANN. § 6998-12 (Supp. 1960).

⁷⁸*Ibid.*

⁷⁹*Walker v. International Paper Co.*, 230 Miss. 95, 92 So. 2d 445 (1957).

medical experts rather than wholly in the discretion of the commission or the court.

This major-minor test would still be flexible enough to change as medical science advances. As medical science progresses and the results of operations become more predictable, reasonable conduct will probably be held to require claimants to submit to surgery in many cases wherein refusal would not be considered unreasonable today.⁸⁰ In the same manner, much of today's major surgery will probably be considered minor and simple in the future.

Whether a person should submit to a back operation for a herniated disc or a fracture, or surgery to correct a hernia, or to a second operation for the same injury should be determined completely on the basis of its classification as major or minor and not on the basis of its being a second operation or on the basis of the part of the body involved. The Workmen's Compensation Law will continue to serve its purpose in this area as long as the burden of proving that the requested surgery is minor is on the employer and the employee has the benefit of any doubt.

The employee should be denied compensation only if the proposed operation is minor and simple, and where there are substantial contrary expert medical views, the employee should prevail. It is only fitting that a decision on a complex medical question should turn on decisions of experts in that field, rather than have these opinions overlooked, as so often happens under the test of reasonableness.

Raymond L. Brown

⁸⁰McCORMICK, DAMAGES 136-37 (1st ed. 1935).

PLANNING FOR INDIVIDUAL LIFETIME CHARITABLE GIVING

I. INTRODUCTION

With the increase in the number of available charitable donors allowed by our taxation laws, there has been a concomitant increase in the lawyer's need to know more about the statutory advantages for charitable donations. An attorney must not only study the narrow statutory limits for a charitable deduction, but he must also be familiar with the numerous plans which are available to the charitable donor.

What are the organizations to which one may give and be entitled to a charitable deduction? What are the mathematical limitations on the amount a donor may deduct from his taxes? What are some of the specific types of gifts which can be made permitting one to take a charitable deduction, and just how does one go about making these gifts?

This paper is intended to answer these questions by an analysis of charitable deductions extending from statutory requirements through specific plans with comment on the particular advantages and disadvantages of some widely used methods of charitable giving.

II. STATUTORY REQUIREMENTS

A. Deductible Organizations

The Internal Revenue Code provides that, for the purpose of the income tax deduction, gifts may be made "to or for the use of" such entities as a state, territory, possession of the United States, or any political subdivision thereof,¹ but only if the contribution or gift is made exclusively² for public purposes.

An income tax deduction may be obtained where one makes a gift to a corporation, trust, or community chest, fund, or foundation which has been created or organized in the United States, or in any possession thereof, or under the law of the United States, any state or territory, the District of Columbia, or any possession of the United States.³ One should note that a question may arise as to whether a contribution to a community chest would be recognized under the estate tax since there is a provision for these organizations under the income and gift taxes⁴ but no such provision under the estate tax.⁵ In addition, while the income tax law restricts deductions to corporations, "organized in the

¹INT. REV. CODE OF 1954, §170 (c).

²For definition of "exclusively," see also Henriette T. Noyes, 31 B.T.A. 121 (1934).

³INT. REV. CODE OF 1954, § 170 (c) (2).

⁴INT. REV. CODE OF 1954, § 2055 (a); § 2522 (a).

⁵INT. REV. CODE OF 1954, § 2055 (a).

United States or in any possession thereof," the estate tax and the gift tax make no such restriction.⁶

The donee corporation, trust, or community chest, fund, or foundation, must also be organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals. Under the estate tax only the "corporation" must be organized and operated for the specific purposes⁷ whereas both income and gift tax statutes⁸ require the corporation, trust, community chest, and others to meet this standard. The estate tax requires that gifts to trustees and fraternal societies be used exclusively for charitable purposes.⁹ The statutory words, "exclusively for charitable purposes," have been held to mean that even though a corporation is not limited by its charter to charitable activities, if there is some other such limitation on the corporation restricting it to charitable activities, such as a provision in its bylaws to this effect, it may nevertheless be considered to be organized exclusively for charitable purposes.¹⁰ Even though some of a corporation's activities are not charitable, it may be considered as operated exclusively for charitable purposes, if the activities are incidental to its primary charitable activities.¹¹

Under the income tax a charitable donee is not eligible for the charitable gift if any part of the net earnings inure to the benefit of any private shareholder or individual¹² and if any substantial part of its activities is in carrying on propaganda¹³ or otherwise attempting to influence legislation. Both the estate and the gift taxes restrict the available donees in a like manner,¹⁴ but the estate tax limitation on carrying on propaganda for a fraternal society's qualification¹⁵ will not be found in the income or gift tax limitations. Since the estate tax limitation on "carrying on propaganda" may be read into the income and gift tax laws, it would be an unwise conclusion to say that gifts to fraternal organizations carrying on propaganda or attempting to influence legislation would be deductible under the two taxes.¹⁶

Under the three taxes, deductions are allowed for gifts to posts or organizations of war veterans which are organized in the United States

⁶INT. REV. CODE OF 1954, § 2055 (a); § 2522 (a) (2).

⁷INT. REV. CODE OF 1954, § 2055 (a) (2).

⁸INT. REV. CODE OF 1954, § 170 (c) (2) (B); § 2522 (a) (2).

⁹INT. REV. CODE OF 1954, § 2055 (a) (3).

¹⁰See *Faulkner v. Commissioner*, 112 F.2d 987, 991 (1st Cir. 1940).

¹¹*Philip R. Thayer*, 24 T.C. 384 (1955).

¹²INT. REV. CODE OF 1954, § 170 (c) (2) & (D).

¹³*Roberts Dairy Co.*, 19 P-H Tax Ct. Mem. 910 (1950).

¹⁴INT. REV. CODE OF 1954, § 2055 (a) (2); § 2522 (a) (2).

¹⁵INT. REV. CODE OF 1954, § 2055 (a) (3).

¹⁶See H.R. REP. NO. 2333, 77th Cong., 2d Sess. 157 (1942).

and in which no part of the net earnings may inure to the benefit of any private stockholder or individual.¹⁷

The income tax statute makes two other donees available to the taxpayer which the estate and the gift tax statutes do not allow.¹⁸ One is the allowance of a deduction for amounts transferred to a cemetery company owned and operated exclusively for the benefit of its members or any corporation chartered solely for burial purposes. Such corporations must not be permitted by their charter to engage in any business not necessarily incident to that purpose, and the company or corporation is not permitted to operate at a profit or have part of the net earnings inure to the benefit of any private shareholder or individual. The other allowable deduction arises during the period that a taxpayer maintains an individual as a member of his household under an agreement with an organization qualified under the income tax as a deductible organization and as long as the individual is a full-time pupil in the twelfth or any lower grade in an educational institution. This deduction is limited to a certain amount each month which represents unreimbursed expenses for someone other than the taxpayer's dependent or relative.¹⁹

B. Mathematical Limitations

The full amount donated to a qualified charity is deductible under the estate and gift taxes from the donor's gross estate²⁰ or gross gifts.²¹ However, this is not the case with deductions under the income tax. Here the general limitation on deductions is that the total deductions for any taxable year shall not exceed twenty per cent of the taxpayer's adjusted gross income, which is to be computed without regard to any net operating loss carrying back to that year. This limitation has to be computed without any regard to any deduction under the special ten per cent limitation provision except to the extent that any charitable contributions to the qualified ten per cent donees exceeds the amount allowable to that class of donees.²²

The income tax provisions permit, in addition, a special rule as to deductions to a church or convention or association of churches;²³ an educational organization;²⁴ or a hospital or medical research organization directly engaged in the continuous active conduct of medical re-

¹⁷INT. REV. CODE OF 1954, § 170 (c) (3); § 2522 (a) (4).

¹⁸INT. REV. CODE OF 1954, § 170 (c) (5) & (d).

¹⁹INT. REV. CODE OF 1954, § 170 (d) (2).

²⁰INT. REV. CODE OF 1954, § 2055 (a).

²¹INT. REV. CODE OF 1954, § 2522.

²²INT. REV. CODE OF 1954, § 170 (b) (1).

²³INT. REV. CODE OF 1954, § 179 (b) (1).

²⁴See. Rev. Rul. 56-262, 1956-1 CUM. BULL. 131.

search in conjunction with a hospital. If during the year in which the contribution is made such organization is committed to spend such contributions for such research before January 1 of the fifth calendar year which begins after the date of such contribution, the deduction is allowed the extent that the aggregate of such contributions does not exceed ten per cent of the taxpayer's adjusted gross income computed without regard to any net operating loss carryback to the taxable year. The special ten per cent rule is further limited to those donations which are "to" a particular charity as distinguished from "for their use."²⁵ The Regulations state that a donation to a qualified organization which then turns the funds over to an organization provided for in the special ten per cent rule will not qualify for the special ten per cent deduction unless the first qualified donee is merely an agent for delivery to the second donee.²⁶ For example, an outright gift to the University of Mississippi would qualify for the ten per cent deduction, but if it were made to a charitable fund which later decided to donate the funds, it would not qualify for the ten per cent rule.²⁷

The one exception to the percentage restriction is the unlimited charitable deduction. An unlimited deduction may be obtained where the amount of charitable contributions plus the amount of income tax paid during such year, without use of self-employment income, exceeds ninety per cent of the taxpayer's income and has exceeded this amount for the past eight out of ten years.²⁸ This percentage (ninety per cent of taxable income) is to be computed without regard to the current deductions for charity under the section; any allowance of deductions for personal exemptions; or without regard to any net operating loss carryback to the taxable year. In the computation of the income tax paid in past years one may substitute for a particular year the actual amount of taxes that have been paid for that particular year as long as this amount is not included in any other year.²⁹ This last provision as to the amount of income tax paid during any year will thus allow deficiencies and payments of estimated tax to be attributed back to the year to which they relate.

Another limitation provided in the code requires a reduction in the amount of a charitable deduction where a recipient or other person assumes a liability or where a charitable contribution is of property which is subject to a liability, thus preventing a double deduction.³⁰ The contribution deduction will be reduced for interest which has been or will be paid in the future by the taxpayer attributable to the liability and

²⁵Treas. Reg. § 1.170-2 (b) (1) (1958).

²⁶Treas. Reg. § 1.170-2 (b) (1) (1958).

²⁷See Treas. Reg. § 1.170-2 (b) (1) (1958).

²⁸INT. REV. CODE OF 1954, § 170 (b) (1) (C).

²⁹INT. REV. CODE OF 1954, § 170 (b) (1) (C).

³⁰INT. REV. CODE OF 1954, § 170 (b) (4).

which is attributable to any period after the making of the contribution. Where the contribution is of a bond or other evidence of indebtedness there shall be a further reduction for any amount which has been paid or will be paid on an indebtedness made or continued to purchase the bond where such interest is attributable to the period before making the contribution.

C. Denial of Deduction

The most common denial of deduction will usually arise where a gift is made to an organization which does not meet the specifications of the deductions sections. A charity may have passed the inspection in an earlier year but later it may not. Even though the Commissioner has revoked exemptions retroactively, he will usually allow a deduction until notice of revocation has been published.³¹ Of course, if the donor had prior knowledge of the revocation, the deduction would not be allowed. With estate and gift tax deductions the question of qualification deals only with whether the organization had qualified on the date of the gift or bequest.

A deduction may be denied under the three taxes by section 503 (e) ³² when gifts or bequests are to section 501 organizations³³ which have entered into prohibited transactions.³⁴ When an organization's exemption has been revoked, the deduction will be denied for the taxable years after the year in which the organization is notified of its prohibited transactions.³⁵ However, where diversion of a part of the income or corpus from exempt purposes is made, no notice is needed to deny exemption,³⁶ but the deduction will not be disallowed in the year of diversion and prior years unless the donor or a member of his family is a party to the transaction.³⁷ Section 681 will also disallow deductions for estate and gift tax purposes where the transfer is to a trust which has entered into prohibited transactions.³⁸

Under section 504 exemption may also be denied section 501 (c) (3) organizations, to which section 503 is applicable, for unreasonable accumulations of income.³⁹

An income tax deduction may also be disallowed based on the manner of the gift, rather than upon the character of the donee.⁴⁰ No deduc-

³¹*Automobile Club v. Commissioner*, 353 U.S. 180 (1957).

³²INT. REV. CODE OF 1954.

³³INT. REV. CODE OF 1954.

³⁴INT. REV. CODE OF 1954, § 503 (c).

³⁵Rev. Proc. 57-5, 1957-1 CUM. BULL. 727.

³⁶See INT. REV. CODE OF 1954, § 503 (a) (2).

³⁷INT. REV. CODE OF 1954, § 503 (e).

³⁸INT. REV. CODE OF 1954.

³⁹INT. REV. CODE OF 1954; Treas. Reg. § 1.504-1 (f) (1958).

⁴⁰INT. REV. CODE OF 1954, § 170 (b) (1) (D).

tion for a gift in trust will be allowed if the donor has a reversionary interest in the corpus or income of the contributed property which exceeds five per cent of the value of the trust. A reversionary interest means the possibility that the income or property may revert in the grantor or his estate, or the possibility that it may be subject to a power exercisable by the grantor or a nonadverse party to return it to the grantor or his estate.⁴¹

Finally, an income tax deduction will be denied to organizations either listed or ordered to register on the lists of the communist-action or communist-front organizations maintained by the Attorney General.⁴²

III. GENERAL CONSIDERATIONS FOR LIFETIME GIVING

A. Basic Gift Requirements

Inter vivos gifts to charity seem to provide many tax advantages for the taxpayer of means. Also, by wise planning a taxpayer will be able to give his property to charity, taking advantage of the income tax deductions available and thus effect significant estate tax savings.

No matter whether one is on the cash or accrual method of accounting, a gift of cash can be deducted only when actually made.⁴³ No right to a deduction is received by merely signing a pledge.⁴⁴ Payments, other than cash, must be of enough substance to be capable of valuation. For example, the Commissioner takes the view that permission to use property does not represent "payment"⁴⁵ made to or for the use of a charity nor does it constitute a gift of "property." The Commissioner claims that this type of gift represents merely the granting of a privilege for which no charge is made,⁴⁶ but he has held to the contrary when use of property was in the form of a determinable fee.⁴⁷

Usually only gifts of money or property, including tangible and intangible personality, have been allowed deductions; therefore, the Internal Revenue Service takes the position that the value of contributed services is not deductible.⁴⁸ The definition of "services" is not very clear. The gift of the value of legal work performed by an attorney;⁴⁹ the furnishing of advertising space by a newspaper;⁵⁰ and the donating

⁴¹Treas. Reg. § 1.170-1 (a) (1958).

⁴²INT. REV. CODE OF 1954, § 170 (e) (2).

⁴³Treas. Reg. § 1.170-1 (a) (1958).

⁴⁴Mann v. Commissioner, 35 F.2d 873 (D.C.Cir. 1929).

⁴⁵I.T. 3918, 1948-2 CUM. BULL. 33.

⁴⁶*Ibid.*

⁴⁷Priscilla M. Sullivan, 16 T.C. 228 (1951), acquiesce, 1951 CUM. BULL. 3.

⁴⁸Treas. Reg. § 1.170-1 (1958).

⁴⁹O.D. 712, 1920-3 CUM. BULL. 188.

⁵⁰Rev. Rul. 57-562, 1957-2 CUM. BULL. 157.

of blood⁵¹ have all been considered services and therefore denied deductions.

Fixing the date gifts become effective is important, since percentage limitations and taxpayer's income and tax rates vary. As a general proposition, the date property is delivered is the effective date of gift.⁵² When the gift is a check and it is delivered, the gift is effective even though the check is cashed in a later year.⁵³ Where the mails are used, the date of mailing constitutes delivery with the postal service being agent for both sender and recipient.⁵⁴ In the case of stock, delivery of a properly endorsed certificate marks the date of gift. But a stock certificate is only effective from the date it is transferred on the corporation's books when the delivery has been made to the agent of the donor.⁵⁵ Objects which render delivery inconvenient may be donated without actual exchange of physical possession.

When a gift is made of something other than cash its value is generally held to be the fair market value of the object. Fair market value is the price at which the property would change hands between a willing seller and a willing buyer, neither being obligated to sell or buy.⁵⁶ The rule of valuation has been subject to limitation, such as the case where the taxpayer could only deduct the cost of automobiles he donated to charity rather than their fair market value. The automobiles were unmarketable in his hands because he purchased the cars from the manufacturer specifically for donation to the charity.⁵⁷

B. Specific Types of Gifts

1. *Inventory as a Gift*

Having considered the general requirements for gifts to charities, it is necessary to look to the specific items which may be given advantageously to a charitable organization.

Inventory items are clearly proper items to obtain a charitable deduction. If the taxpayer gives property which he sells in the ordinary course of his business, the fair market value is considered as the price which the taxpayer would have received if he had sold the contributed property in the lowest usual market in which he customarily sells at the time and place of contribution.⁵⁸ The value of the contributed property must be adjusted for costs and expenses incurred in the year of contribu-

⁵¹Rev. Rul. 162, 1953-2 CUM. BULL. 127.

⁵²Treas. Reg. § 1.170-1 (b) (1958).

⁵³Estate of Modie J. Spiegel, 12 T.C. 524 (1949).

⁵⁴Estate of Witt v. Fahs, 160 F. Supp. 521 (S.D. Fla. 1956).

⁵⁵Treas. Reg. § 1.170-1 (b) (1958).

⁵⁶Treas. Reg. § 1.170-1 (c) (1958).

⁵⁷J. J. Cooley, 33 T.C. 223 (1959).

⁵⁸Treas. Reg. § 1.170-1 (c) (1958).

tion in producing or acquiring the contributed property. In addition, any costs and expenses which are reflected in the costs of the goods sold on the year of donation and were incurred in a prior taxable year must be deducted from the value of the gift.⁵⁹ Inventory deductions may now be had by the farmer or manufacturer when he contributes his agricultural or manufactured products without fear of incurring a realization of gross income.⁶⁰

Even in the light of certain adjustments required by the Treasury, inventory assets, being ordinary income assets, are still attractive items for charitable gifts, provided there is a substantial spread between the taxpayer's cost of acquiring them and their fair market value.

2. *Shares of Stock as a Gift*

When one considers contributing shares of stock, dividends as well as valuation must be considered. When the donor is the record owner at the date of gift and dividends are declared payable, these dividends are sometimes held to be realized income to the donor when received by donee.⁶¹ Where the donor can anticipate payment of dividends in the near future they are still not income to the donor when neither declared nor paid.⁶²

Contribution of section 306 stock presents an excellent way for stockholders to make charitable contributions with the maximum of tax advantages and a minimum of cost.⁶³ One method is described in a recent Internal Revenue Service ruling⁶⁴ dealing with the deductibility of preferred stock received as a dividend and contributed by the shareholder to an exempt organization. Preferred stock which is received without recognition of gain, usually becomes section 306 stock. One example is the occasion where new preferred stock is issued as a dividend on common stock. If the shareholder gives his stock away, he realizes no income of any kind from the gift regardless of the tax statute of the recipient.⁶⁵ In addition, if the contribution is to a charitable organization, the measure of the contribution is the entire fair market value of the stock donated. But in contemplating such a transaction, it would be safer to avoid a specific redemption date either in the stock certificates or by a provable agreement between the parties since the lack of prearrangement was one of the conditions in the ruling.⁶⁶

⁵⁹*Ibid.*

⁶⁰Rev. Rul. 55-138, 1955-1 CUM. BULL. 223.

⁶¹Lillian M. Newman, 1 T.C. 921 (1943).

⁶²Glenn S. Allen, Sr., 13 P-H Tax Ct. Mem. 48 (1944).

⁶³See INT. REV. CODE OF 1954, § 306.

⁶⁴Rev. Rul. 57-328, 1957-2 CUM. BULL. 229.

⁶⁵ALEXANDER, FEDERAL TAX HANDBOOK 911 (24th ed. 1960).

⁶⁶Rev. Rul. 57-328, 1957-2 CUM. BULL. 229.

The advantages of giving stock in the methods mentioned are evident when a stockholder in a closely held corporation can give away a substantial portion of his equity in the corporation to charity, relieving his estate of the value of the property transferred, and not relinquish his control. In addition, the valuation which the donor establishes in these gifts involving closely held property may establish some precedent for valuation in the taxpayer's estate for estate tax purposes, even though the proceedings in the income tax area would not be binding on the Internal Revenue agent auditing the estate.

3. *Life Insurance as a Gift*

When insurance policies have been irrevocably donated, there is little doubt as to a deduction for the policies and the premiums thereon. In the past a policy's value when donated was its cash surrender value,⁶⁷ but this rule has been changed to be the cost of replacement at the date of the gift.⁶⁸ The value of a policy which has been owned for some time is approximated as the interpolated terminal reserve value at the date of gift as it relates to the period after that date.⁶⁹ Payments of premiums on policies irrevocably assigned to qualified charities would appear at first glance to qualify for the special ten per cent limitation on income tax deductions, but it has been held that payment of premium is not a gift to the charity but is for the use of the charity and not entitled to the special limitation.⁷⁰

It has been suggested that substantial savings may be obtained for income and estate taxes by the use of life insurance policies as a gift.⁷¹ The insured may create an irrevocable charitable trust to run for his lifetime and transfer to the trust an insurance policy on his life, while donating funds each year to pay premiums. The insured names himself trustee and makes the trustee the beneficiary of the policy, but only to pay out the proceeds for charitable purposes. In addition, the trust instrument should contain provisions for permission to the trustee to designate the charitable beneficiaries and to change them as long as the beneficiaries are at all times qualified, tax exempt charities. From this arrangement⁷² payment of a premium on a life insurance policy is deductible where the trustee is the named beneficiary and where the trustee must then use the proceeds for charitable purposes. This is true even though the grantor-trustee can designate the beneficiaries so long as the pay-out must ultimately go to a qualified charity.

⁶⁷Ernst R. Behrend, 23 B.T.A. 1037 (1931).

⁶⁸Guggenheim v. Rasquin, 312 U.S. 254 (1941).

⁶⁹Rev. Rul. 59-195, 1959-1 CUM. BULL. 18.

⁷⁰Mortimer C. Adler, 5 B.T.A. 1063 (1927).

⁷¹Goldberg, *How to Use Life Insurance for Charitable Endowment in Estate Planning*, ESTATE TAX TECHNIQUES 781 (1961).

⁷²*Ibid.*

It is possible that an individual, as trustee, has the power to change the beneficial ownership of a policy or its proceeds as an incident of ownership.⁷³ Since the grantor is also trustee, and as trustee has the right to change the beneficiaries, it may be that he has a sufficient incident to cause the insurance proceeds to be included in his gross estate.⁷⁴ If the proceeds are included in the gross estate of the donor, this additional amount will increase the maximum limit for marital deduction to be used in transfers to the spouse,⁷⁵ while permitting a deduction for a transfer to a charitable organization under the estate tax.⁷⁶

Another possibility in dealing with life insurance policies might be to transfer a policy to a charitable trust making the settlor-donor a co-trustee with the representatives of some charitable organization. In this way the charitable trust could be the beneficiary of the insurance policy while the charitable organization would be in the status of the trust beneficiary. It is then possible that the donor of the policy could retain a power to change beneficiaries of the trust to other qualified charities in conjunction with the co-trustee. Since the estate tax statutes could include in a donor's estate that property over which he has retained some power to designate who shall possess or enjoy the property either alone or in conjunction with another, this property would possibly be included in the donor's estate. This would result in an increase in the allowable marital deduction and therefore would possibly be regarded as a contribution to the charity at death, entitling him to an estate tax deduction. Such methods apparently have never been tested in the courts.

4. *Object of Art as a Gift*

In recent years owners of works of art have been able to take advantage of the deductibility of the present value of a remainder interest when donated to a charity. Utilizing this principle a donor may reserve the exclusive right to possession in his deed of gift and deliver the deed to a qualified organization, thereby receiving an immediate income tax deduction for the remainder interest's present value.⁷⁷ By retaining the life interest in the object of art this property will be included in his gross estate under the estate tax, and the inclusion will increase the allowable marital deduction.⁷⁸ Furthermore, since the life interest passes to the charity at the taxpayer's death, the charitable estate tax deduction should also be allowed for the portion passing.⁷⁹ Thus, this arrange-

⁷³See Treas. Reg. § 20.2042-1(c) (4) (1958).

⁷⁴See INT. REV. CODE OF 1954, § 2042.

⁷⁵See INT. REV. CODE OF 1954, § 2056(c).

⁷⁶INT. REV. CODE OF 1954, § 2055.

⁷⁷Rev. Rul. 57-293, 1957-2, CUM. BULL. 153.

⁷⁸See INT. REV. CODE OF 1954, § 2036; § 2056.

⁷⁹See INT. REV. CODE OF 1954, § 2055.

ment permits present income tax advantages at the taxpayer's death while letting the property pass to the charity without administration problems.

5. *Patents and Copyrights as Gifts*

For charitable deductions under the income tax the Treasury has indicated⁸⁰ that donation of a patent or an undivided interest may constitute a deductible gift. In addition, since the Treasury has stated that copyright components are properties for assignment of income purposes,⁸¹ it may be presumed that both the parts and the whole of a copyright can be the subject of a deduction.

It has been held that unless the assignment lacks substance,⁸² an inventor may make a donation of his patent or an undivided interest and not have the royalties and proceeds of the patent taxable to him.⁸³ One court has held that this is not true in regard to a copyright or a part thereof,⁸⁴ but the Treasury position is otherwise.⁸⁵ If a contributor has a royalty agreement resulting from a prior assignment of his copyright or patent, he may make an effective gift by assigning his royalty contract and any retained interests,⁸⁶ but this will not be true if only the royalties are transferred without the license agreement also.⁸⁷

Since most of the cases in this area do not deal with whether the transfer should be effective because it is of an ordinary income or capital gains type, but there is basis for assuming that if the contribution is of an ordinary income royalty, a deduction will be allowed if the entire interest is donated. If this is true there would be an exclusion from ordinary income while also getting a charitable deduction.

To obtain a combination of income and estate tax benefits from the use of patents one possibly could create a trust to which the taxpayer assigns all right to the patent with the income payable to the charitable beneficiary. The taxpayer-settlor could then retain only the power to change the beneficiary to another qualified charitable organization. From this arrangement there should be the right to a deduction for the present interest passed to a trust which can only pay out to a qualified charity. In addition the right to change the beneficiary to another charity should make this property includible in the gross estate at taxpayer's death.⁸⁸ This would mean that the maximum marital deduction

⁸⁰Rev. Rul. 58-260, 1958-1 CUM. BULL. 126.

⁸¹Rev. Rul. 54-409, 1954-2 CUM. BULL. 174.

⁸²Ray Harroun, 14 P-H Tax Ct. Mem. 860 (1945).

⁸³Rev. Rul. 58-260, 1958-1 CUM. BULL. 126.

⁸⁴See *Wodehouse v. Commissioner*, 178 F.2d 987 (4th Cir. 1949).

⁸⁵Rev. Rul. 54-599, 1954-2 CUM. BULL. 52.

⁸⁶*Heim v. Fitzpatrick*, 262 F.2d 887 (2d Cir. 1959).

⁸⁷*Lewis v. Rothensies*, 61 F. Supp. 862 (E.D.Penn. 1944).

⁸⁸See INT. REV. CODE OF 1954, § 2036.

would be increased while possibly allowing an estate charitable deduction for the amount passing at death. Of course this plan could be attacked on several grounds. It could be said that this power to change the beneficiaries is not such a power as would include the property in the gross estate. Relying on the fact that section 674⁸⁹ does not require a taxpayer to be regarded as the owner of trust property if he only has a power to appoint to certain charities under the income tax, it could be argued that there should be no estate tax inclusion. It might also be argued that this is an ascertainable standard which would not include the amounts.

IV. METHODS

A. Nontrust Methods

1. *Gift-Sale to Charity*

When a taxpayer has appreciated assets and seeks a method of making a contribution with tax advantages he may use the scheme of selling the appreciated asset to the charity at his cost basis and thereby make a donation of the difference between the sale price and the fair market value of the object.⁹⁰ The apparent advantage of this method is that the donor recovers his cost in the asset while obtaining the deduction for a gift to charity.

In one of the few cases dealing with a charitable deduction obtained as the result of a gift-sale to a charity,⁹¹ the taxpayer had sold real estate to a charity. He filed no gift tax return but later claimed that he was entitled to a charitable deduction for the difference in the fair market value of the property sold and the sale price. The court held that there was no excess between the fair market value and the sale price and stated by way of dictum that no donative purpose seemed to prompt the taxpayer in his conduct.⁹² Relying on this dictum, the donor should build a record to prove that it was his intent at the time of sale to make a gift of such excess to the institution in order to obtain the income and gift tax benefits.

In considering the gift-sale method one must take into account the fact that if the donor sells his assets for less than fair market value, but for more than the taxpayer's basis, he will realize a gain, which may be taxed in accordance with whether the property was ordinary income or capital gains bearing.⁹³

Thus, in using the gift-sale method of charitable giving, the donor

⁸⁹INT. REV. CODE OF 1954.

⁹⁰Merritt, *The Tax Initiative for Lifetime Gifts to Charity*, 39 TAXES 106 (1961).

⁹¹John M. Coulter, 19 P-H Tax Ct. Mem. 230 (1950).

⁹²*Id.*, at page 250.

⁹³Magnolia Dev. Corp., 29 P-H Tax Ct. Mem. 1032 (1960).

cannot only donate to the object of his beneficence while obtaining income tax advantages, but he can also successfully retain funds to make additional purchases of assets and relieve his estate of the value of the property which is transferred, incurring no estate tax on this portion.

2. *Transfer to Charity with Notes or Mortgages Back*

The use of notes may come into consideration when mathematical limitations prevent a taxpayer from donating an entire unit of property in one year, thereby creating a need to spread the gift over several years.

The scheme is simply to have the charity execute noninterest bearing notes for the difference between the value of the property and the amount which the donor can take as a charitable deduction in the year of the contribution. Then in a subsequent year the donor will cancel the notes.⁹⁴ However, it must be noted that there are dangers in this plan of donating property. First, the Commissioner may contend that the entire gift will have to be deducted, if at all, in the year of the transfer of the property on the ground that there was a lack of intent to enforce the notes.⁹⁵ Secondly, the Commissioner may argue that there has been a sale where the taxpayer's basis in the property is less than the amount of the notes.⁹⁶ In the event the Commissioner's second argument is adopted, the donor will have to pay a capital gains tax arising from the transaction.⁹⁷

3. *Gifts of Fractional Interest*

A fractional donation is sometimes imperative due to the size of the property to be donated. A donor may contribute an undivided interest in an entire piece of property, by deed or other conveyance, and receive a deduction for the value of the undivided interest.⁹⁸ A deduction for the undivided interest may be had even though the donor intends to donate the remaining interest, but only if he is under no obligation to convey the other portion. If the donor so desires, he may enter into a lease arrangement with the charity to permit it to have possession of the fraction not donated. The Treasury has ruled that the donation of the uncontributed portion of the property which had been under lease at a fair rental value for several years would qualify for a charitable deduction.⁹⁹ There is also some benefit for estate tax purposes in this arrangement, since part of the property is removed from the taxpayer's estate.

⁹⁴See *Andrus v. Burnet*, 50 F.2d 332 (D.C. Cir. 1931).

⁹⁵See *Minnie E. Deal*, 29 T.C. 730 (1958).

⁹⁶*Ibid.*

⁹⁷See Rev. Rul. 55-157, 1955-1 CUM. BULL. 293; INT. REV. CODE OF 1954, § 453 (d).

⁹⁸See Rev. Rul. 57-261, 1958-1 CUM. BULL. 143.

⁹⁹*Ibid.*

In line with these plans, one may consider the device by which a taxpayer making a charitable contribution may be able to double the tax benefits in a gift of income producing property for a limited period. One scheme has been used wherein the taxpayer transferred an oil payment right to a charity with the deed of gift providing that the charity was to receive a certain sum from oil production and then the oil payment right would revert.¹⁰⁰ This plan was allowed, permitting the donor to exclude the income from the oil production from his gross income while taking a charitable deduction for the fair market value of the property transferred.

It is clear that the device above would not have accomplished the desired results under the Internal Revenue Code of 1954 if the trust form had been used. This is so because the charitable deduction is denied to such trusts where a reversionary interest of more than five per cent is retained. However, when nontrust transactions are used, there does not seem to be any express statutory prohibition. It should also be noted that the charitable gift in this situation may qualify for the additional ten per cent limitation under the income tax as being a contribution to and not merely for the use of the organization.¹⁰¹

But aside from the advantages of this last method, one must be extremely cautious in selecting the types of income rights and the methods by which the transfer is executed, for the Commissioner may argue that there is only an assignment of the income and not the "tree" from which it comes.¹⁰² Another problem present in the use of income rights is the possibility that the deduction may be disallowed if a constructive trust¹⁰³ can be found thereby invoking the five per cent reversionary interest rule of section 170. In addition, it must be noted that while income tax benefits can be obtained by using the above plan the estate tax imposed on the property may overshadow such benefits. Since the taxpayer has retained a reversionary interest in the property transferred to the charity for the period, if he dies during the period the property will be considered a part of the taxpayer's gross estate for estate tax purposes.¹⁰⁴

4. *Life Income Plan*

The inherent unwillingness of taxpayers to make complete gifts of property to charity has been the author of another device for donating to a charitable organization. This method is the life income plan,¹⁰⁵

¹⁰⁰L. A. Nordan, 22 T.C. 1132 (1954).

¹⁰¹INT. REV. CODE OF 1954, § 170 (b).

¹⁰²See *Lucas v. Earl*, 281 U.S. 111 (1930).

¹⁰³See *Weil v. United States*, 180 F. Supp. 407 (Ct. Cl. 1960).

¹⁰⁴See INT. REV. CODE OF 1954, § 2036.

¹⁰⁵See Merritt, *supra* note 90, at 113.

under which the donor agrees with the charitable institution to transfer cash or property in return for income for life. The income is payable to the donor, after whose death the corpus passes outright to the charitable organization.

The gift of a remainder interest is generally held by the Service to be deductible in the year of gift for income tax purposes.¹⁰⁶ The value of a remainder interest after a life estate is normally determined from the gift tax regulations.¹⁰⁷ If the object donated consists of appreciated property, the taxpayer will usually realize no taxable gain,¹⁰⁸ but any amounts received by the donor from the income plan are fully taxable as income.¹⁰⁹

From an estate tax standpoint the donor-taxpayer, by retaining a life interest in the income from the property transferred to the charitable institution, will have the value of the property included in his gross estate for computation purposes, but with an offsetting charitable deduction allowable. In addition, the inclusion of the property in the taxpayer's gross estate will increase the maximum allowable marital deduction, thus giving substantially more tax benefits. A gift tax may be assessed against the taxpayer if, under the income plan, the annual amounts are to be paid to him and then to his survivor.¹¹⁰

5. Gift Annuity

Another donative device is one which involves a transfer of money or property in exchange for a stipulated annuity from a charity. In the usual charitable gift annuity, it is intended that the charitable organization retain a substantial portion of the principal. This form differs from a commercial annuity which repays to the annuitant a portion of the principal in every payment so that theoretically at the end of the annuitant's life expectancy the entire principal will have been returned.¹¹¹

What will be some of the tax effects on the donor-annuitant? The donor has made a charitable contribution of a portion of the sum transferred to the charity under the annuity plan.¹¹² This deduction is subject to the income tax deduction limitations. An income tax deduction may be taken for the difference between the total amount transferred to the charity and the value of the annuity, the value of the annuity being based on the cost of a similar annuity if purchased from an insur-

¹⁰⁶Rev. Rul. 58-620, 1955-2 CUM. BULL. 56.

¹⁰⁷See Treas. Reg. § 25.2512-5 (1958).

¹⁰⁸*Supra*, note 106.

¹⁰⁹See INT. REV. CODE OF 1954, § 61.

¹¹⁰Rev. Rul. 55-275, 1955-1 CUM. BULL. 295.

¹¹¹CASEY, TAX PLANNING FOR FOUNDATIONS AND CHARITABLE GIVING 148-158 (1953).

¹¹²Anna L. Raymond, 40 B.T.A. 244 (1939), *aff'd*, 114 F.2d 140 (7th Cir. 1940).

ance company.¹¹³ For tax purposes there is a division of the arrangement into two parts: (1) a deductible gift in the amount of the excess of the amount paid over the value of the annuity; and (2) a purchase of the annuity.

Upon receipt of the payments under an annuity-gift arrangement, the proceeds are taxed to the donor-annuitant as an annuity payment and as a result are only partially includible in taxable income.¹¹⁴ Taxable income to the donor-annuitant will be the excess of the annuity over the annual exclusion. The annual exclusion is found by dividing the number of years of life expectancy into the present value of the annuity—its cost.¹¹⁵

A special situation may arise when appreciated property is used to purchase an annuity. Usually no taxable gain will arise when a taxpayer donates property which has appreciated in his hands, and he ordinarily receives a deduction for the fair market value of the property.¹¹⁶ But when property is transferred to a charitable organization for a gift annuity, the donor-annuitant has purchased a right to receive payments which have a definite value. Therefore, if the property transferred has a lower adjusted tax basis in the donor's hands than the cost of the annuity contract, the transaction is construed to be a taxable exchange combined with a gift, resulting in a taxable gain to the donor. The amount of the gain would be the excess of the present value of the annuity over the donor's basis in the property.¹¹⁷ But the gain which might arise from the use of appreciated property could possibly be deferred. The deferment may be obtained if the rule that annuity contracts can have no ascertainable value¹¹⁸ is carried over to apply to charities.

The annuity plan, when considered as merely a gift and a purchase, will result in no estate tax to the taxpayer since he has divested himself of his property and has purchased an annuity for a consideration. Therefore the only benefit in estate taxes would be the loss of the amounts which could have been included in the gross estate, but which were transferred by gifts.

B. Trust Methods

1. *Trust with Life Estate in Donor, Remainder to Charity*

Gifts to charitable institutions involving the use of the trust device present an additional area from which a prospective donor may draw

¹¹³See Treas. Reg. § 1.170-2(a)(3).

¹¹⁴INT. REV. CODE OF 1954, § 72.

¹¹⁵INT. REV. CODE OF 1954, § 72(b).

¹¹⁶Rev. Rul. 410, 1955-1 CUM. BULL. 297.

¹¹⁷See Note, 1957 WASH. U.L.Q. 153.

¹¹⁸See *Commissioner v. Kann's Estate*, 174 F.2d 357 (3d Cir. 1949).

for advantageous methods to donate to the charitable object of his bounty.

A donor may create an irrevocable trust, providing for income to be paid to himself for life with remainder over to a qualified charitable beneficiary at his death.¹¹⁹ Using this plan, the donor-settlor would be able to take an income tax deduction for the present value of the remainder interest passing to the charity. This deduction would be limited to the percentage requirements of the Internal Revenue Code, and even though the beneficiary of the trust qualified as a special ten per cent limitation organization, it is settled that the additional ten per cent could not be used by the taxpayer.¹²⁰

Since the taxpayer has retained the right to the income from the trust, the proceeds will be taxable under section 61 as income derived from property. The retention of the right to income will have estate tax effects, which will result in an inclusion of the trust property in the taxpayer's gross estate.¹²¹ Two factors may offset this inclusion: (1) The taxpayer will be entitled to an estate tax charitable deduction for the value of the interest passing to the charity, and (2) there will be an increase in the marital deduction limitation¹²² resulting from the inclusion of the trust property in the gross estate. Thus by using the trust arrangement with the remainder to charity after the life estate, the taxpayer may avail himself of tax advantages without surrendering the income from his property during life.

2. *Trust of Income*

A charitable donation may be in the form of a transfer of property in trust with the income to go to the charitable institution for a period of time. Under the Internal Revenue Code, a settlor will be permitted to fund a trust with the income passing to a qualified charity and the income therefrom will not be taxable to the taxpayer if he has divested himself of the property for a period of at least ten years.¹²³ Such a trust could provide for a reversion in the settlor at the end of this ten year limitation and he would be relieved of the income for the ten year period.

If the taxpayer wishes to avail himself of the charitable deduction for the present interest passing to the charity and also have the income excluded from his taxes, he may create: (1) A trust with the income going to the charity for a period in excess of ten years, with a remainder to a member of his family; or (2) create a trust for a period in excess of two years, the income going to a church, educational organization or

¹¹⁹INT. REV. CODE OF 1954, § 170 (c) ; § 2055 (a) .

¹²⁰See INT. REV. CODE OF 1954, § 170 (b) ; Treas. Reg. § 1.170-1 (b) (1) (1958) .

¹²¹See INT. REV. CODE OF 1954, § 2036.

¹²²INT. REV. CODE OF 1954, § 2055; §2056.

¹²³INT. REV. CODE OF 1954, § 673 (a) .

hospital with remainder over to another member of his family. The effect of the first example is that it complies with section 673 (a) in divesting the settlor of rights in the property for the required time, and it also complies with section 170 (b) (1) (D) in retaining no reversionary interest in excess of five per cent. Thus the taxpayer gets to exclude his income and obtains a charitable deduction for the value of the interest passing to the charity. The settlor-donor will also incur a gift tax for the value of the passing interest to the member of the family without benefit of the annual exclusion.¹²⁴ The second example complies with the requirement of section 673 (b) by being income payable to a church, educational organization, or hospital, and it also complies with section 170 (b) (1) (D) in having no reversionary interest in the settlor exceeding five per cent, thus permitting a charitable deduction for the value of the interest passing to the charity. Here, also, the taxpayer would be subject to a gift tax on the value of the interest transferred to the member of his family while being unable to use the annual exclusion for the future interest.¹²⁵ Therefore, by using the methods of the short term trusts previously set out, the taxpayer may use them to give unlimited sums to charity, or he may take advantage of the double deduction aspects and absolutely divest his estate of the property for the purposes of any future estate tax valuation.

V. CONCLUSION

As has been shown, there are facets of the law involved in charitable donations which every lawyer should be familiar with. So many factors must be considered when contemplating a charitable donation that there has not been sufficient space within the scope of this discussion to cover them. Let this brief word be a caveat: No one should be completely satisfied with his decision on a charitable gift until he has considered the statutes of mortmain; statutes limiting perpetuities; prohibitions against accumulations; and the laws of future interests in addition to taxation laws.

John A. Crawford

¹²⁴See INT. REV. CODE OF 1954, § 2511; § 2503 (b); Treas. Reg. § 25.2503-1 (1958).

¹²⁵See INT. REV. CODE OF 1954, § 2511; § 2503.

RECENT DECISIONS

BANKRUPTCY—REOPENING PROCEEDINGS TO REACH AN ESTATE BY THE ENTIRETY

Assets of bankrupt husband, other than an estate by the entirety, were fully administered; husband was discharged and the estate closed. Approximately two months later, wife filed petition in bankruptcy in the same court. On petition of Ward, a joint creditor of husband and wife, and of the United States, assignee of a joint creditor, the district court entered an order reopening husband's and consolidating it with wife's. The referee in bankruptcy then ruled that the property held in a tenancy by the entirety could be sold by the trustee. **Held:** Affirmed. The fact that the interest of husband and wife in the property could be reached by the creditors of husband and wife on their joint debts, if husband's estate in bankruptcy were reopened and the case consolidated with bankruptcy proceeding of wife, was cause within the meaning of the statute.¹ *In re Reid*, 198 F. Supp. 689 (W.D. Va. 1961).

Creditors seem always to have had a difficult time with an estate by the entirety.² This is so because the estate is not held by moieties, but only *per tout* by husband and wife, who were considered a legal unity at common law.³ In a majority of states, the enactment of a Married Women's Property Act was considered to have abolished such an estate,⁴ since the wife could then hold property in her own name. In those states which recognize a tenancy by the entirety, the estate is usually beyond the reach of creditors of either spouse,⁵ and only a creditor with judgments against both may levy on the property.⁶ The effect of bankruptcy proceedings on such an estate has been in some confusion. Under the Bankruptcy Act it is generally recognized that property held by the entirety will pass to the trustee to satisfy the joint debts of the husband and wife, even though they have petitioned separately for adjudication as bankrupts.⁷ It is also established that a delay in the discharge of one spouse may be granted a joint creditor by the bankruptcy court in order that he might proceed against the entirety property in state court before the discharge puts the estate beyond his reach.⁸ The problem is whether the discharge in bankruptcy of one of the tenants by the entirety puts that estate beyond the reach of a joint creditor. Some states have held that once the debtor is discharged, a joint creditor cannot then proceed against the entirety until that estate is dissolved by death or divorce.⁹ A Michigan statute has been construed to allow the creditor to recover on the theory of a quasi-in-rem

¹Bankruptcy Act § 2 (a) (8), 30 Stat. 544 (1898), 11 U.S.C. § 11 (a) (8) (1952).

²See Huber, *Creditor's Rights in Tenancies by the Entirety*, 1 B. C. IND. & COM. L. REV. 197 (1960).

³E.g., 1 TIFFANY, REAL PROPERTY 645 (2d ed. 1920).

⁴Phipps, *Tenancies by the Entirety*, 25 TEMP. L.Q. 24 (1951).

⁵See, e.g., *Dioguardi v. Curran*, 35 F.2d 431 (4th Cir. 1929).

⁶See, e.g., *Frey v. McGaw*, 127 Md. 23, 95 Atl. 960 (1915).

⁷See, e.g., *Roberts v. Henry V. Dick & Co.*, 275 F.2d 943 (4th Cir. 1960).

⁸See, e.g., *Phillips v. Krakower*, 46 F.2d 764 (4th Cir. 1931).

⁹See, e.g., *Ades v. Caplan*, 132 Md. 66, 103 Atl. 94 (1918); see also 43 HARV. L. REV. 312 (1930).

action,¹⁰ thus circumventing the defense of a discharge from personal liability.¹¹ Other cases have held that although the husband's bankruptcy discharged him of both joint and several personal liability on the debt, it did not affect the distinct liability which the husband and wife undertook as an entity, since the bankruptcy court had no jurisdiction to adjudicate this debt or to control the entirety property.¹² Michigan has recognized this principle simply by holding that a discharge in bankruptcy limits only the sources available for satisfaction, allowing the creditor to proceed against the estate by entirety despite the fact that one of the tenants was discharged in bankruptcy.¹³ However, even though the state court may not give effect to one tenant's discharge in bankruptcy as regards the creditor's action against the estate by the entirety, a different result may be reached when the United States is the joint creditor. The Court of Appeals for the Sixth Circuit held that whenever the United States is plaintiff, even though only an assignee of a joint creditor, the federal court is not bound to apply state law since the basis for jurisdiction is not diversity of citizenship.¹⁴ This court further held that, applying the Bankruptcy Act,¹⁵ the husband's discharge precluded recovery on property held by the entirety.

In the absence of any case authority subsequent to the Married Women's Property Act of 1880,¹⁶ there is some doubt whether an estate by the entirety exists in Mississippi.¹⁷ There are cases,¹⁸ however, holding that a tenancy by the entirety existed after a statute in 1857¹⁹ which gave married women separate property rights, although slightly less liberal than the 1880 statute. These cases, coupled with a present statute,²⁰ implying the existence of a tenancy by the entirety, seem strong authority that Mississippi recognizes such an estate with all the common law characteristics. Therefore, unless Mississippi applies the obviously desirable rule that a discharge in bankruptcy limits only the sources available for satisfaction or some equivalent thereof, this state could be faced with the same type dilemma as discussed above.

Since some states hold that a discharge in bankruptcy of one of the tenants will bar a subsequent action by the creditor to reach the entirety estate, and since this would seem to be the effect when the United States is the creditor, it is submitted that a petition for reopening the bankrupt's estate should be granted when the spouse also goes into bank-

¹⁰MICH. STAT. ANN. § 26.182 (1957).

¹¹*Edwards & Chamberlin Hardware Co. v. Pethick*, 250 Mich. 315, 230 N.W. 186 (1930).

¹²See, e.g., *First Nat. Bank v. Pothuisje*, 217 Ind. 1, 25 N.E.2d 436 (1940), noted in 53 HARV. L. REV. 1389 (1940).

¹³*United States v. Fetter*, 163 F. Supp. 10 (E.D. Mich. 1958), noted in 57 MICH. L. REV. 607 (1959).

¹⁴*Fetter v. United States*, 269 F.2d 467 (6th Cir. 1959), noted in 58 MICH. L. REV. 923 (1960).

¹⁵Bankruptcy Act § 17 (a), 30 Stat. 544 (1898), 11 U.S.C. § 35 (a) (1952).

¹⁶Miss. Code § 1167 (1880) (now Miss. CODE ANN. § 451 (1956)).

¹⁷See *Wolfe v. Wolfe*, 207 Miss. 480, 42 So. 2d 438 (1949); see also *Phipps*, *supra* note 4, at 33; *Huber*, *supra* note 2, at 205.

¹⁸See, e.g., *McDuff v. Beauchamp*, 50 Miss. 531 (1874).

¹⁹Miss. Rev. Code § 23 (1857).

²⁰Miss. CODE ANN. § 834 (1956).

ruptcy. It seems odd enough not to allow a joint creditor to proceed against entirety property when one spouse has been discharged in bankruptcy, without adding a situation where both spouses have been through bankruptcy proceedings, and yet all the property held by the entireties remains untouched.

Arnold F. Gwin

PLEADING—ELECTION OF REMEDIES AS A DEFENSE

Appellee brought an attachment suit against a nonresident debtor in chancery action, and the jurisdiction of the court was established by a garnishment in the attachment suit against a resident debtor. Before the case could be tried appellant obtained permission to file an intervenor, in which it alleged that the account due from the garnishee defendant to the defendant, the nonresident debtor, had been transferred and assigned to the appellant by a legal, written assignment. The appellee then filed a pleading alleging a prior equitable assignment to the appellee of the funds in question, and when testimony evidencing this prior verbal assignment was offered, appellant objected to the admission of such evidence on the grounds of election of remedies. Appellant's objection was overruled and appellee's prior equitable assignment was found superior to appellant's subsequent legal assignment. **HELD:** Affirmed. A defense under the doctrine of election of remedies must be pleaded and can not be brought to the attention of the court by objection to the evidence. A prior dated equitable assignment can be set up as a defense against the legal assignment filed by an intervenor, and the chancery court, having obtained jurisdiction, can determine whether the claimant's assignment was prior in time and superior to the intervenor's assignment. *Anaconda Aluminum Co. v. Sharp*, 136 So. 2d 585 (Miss. 1962).

An election of remedies may be defined as "the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts."¹ This ancient common law doctrine is applicable where an aggrieved party has several remedies by which he may enforce inconsistent or alternative rights growing out of the same transaction and, being cognizant of the facts and of his legal rights, makes an intelligent choice, bringing action by one of the methods.² In the case at bar attachment in chancery action was not an inconsistent remedy. Although jurisdiction is conferred by statute,³ procedure in suit in chancery against a nonresident debtor must be in accord with that of chancery court,⁴ and statutes regulating attachment and garnishments at law do not apply.⁵

"An election of remedies, to be available as a bar must undoubtedly be brought to the attention of the court in some appropriate way."⁶ It is a defense which, to be available, must be pleaded⁷ as an affirmative

¹18 AM. JUR. *Election of Remedies* § 3 (1942).

²See, e.g., *Bierce v. Hutchins*, 205 U.S. 340 (1907).

³MISS. CODE ANN. § 2729 (1956).

⁴*Craig v. Gaddis*, 171 Miss. 379, 157 So. 684 (1934).

⁵See *Inman v. Travelers' Ins. Co.*, 153 Miss. 405, 121 So. 107 (1929).

⁶18 AM. JUR. *Election of Remedies* § 53 (1942).

⁷See *Henderson Tire and Rubber Co. v. Gregory*, 16 F.2d 589 (8th Cir. 1926).

defense,⁸ and it may not serve as the basis of a motion to dismiss a complaint.⁹ The election of remedies must be pleaded by the party who asserts it and the burden of proof is on him to establish it.¹⁰ In Mississippi the defense as to the election of remedies must be made on motion of one or more of the defendants to the suit therein pending and must be supported by proper affidavit.¹¹ Objection to the pleadings must be made before trial, and, if this is not done, neither party may take advantage of a mistake in pleadings after verdict.¹²

Although the principal case presents the unusual situation of a claimant setting up legal title to funds in the garnishee defendant in an attachment proceeding, and then alleging equitable title in himself in defense of an intervenor's claim of legal title, the decision seems to be procedurally sound. Appellee sought to attach funds in the hands of a resident debtor, and it made no difference that under the attachment in chancery statute he also had an assignment. Even if he had stated in his original complaint that he had an assignment, still the remedy would have been by attachment in chancery. Furthermore, if the appellant had wished to raise the issue of election of remedies, he should have plead that defense, since it may not be brought to the court's attention by objection to the evidence. "Proof is received and is considered only as to those matters of fact which are put in issue by the pleadings, and never beyond or outside of them."¹³

Paul Tudor Jones, V

WORKMEN'S COMPENSATION—INTERPRETATION OF THE STATUTORY EMPLOYER CLAUSE

The appellee, Phillips Lumber Company, entered into a contract with Metts, under which Metts was to cut timber owned by the company and deliver it to the company's mill. Rodgers, the claimant, was an employee of Metts and was injured while performing work under the contract Metts had with the company. Metts carried no workmen's compensation insurance, but the Phillips Lumber Company did carry such insurance. Rodgers contended that the lumber company was liable to him for compensation under that section of the Workmen's Compensation Act which states that "in the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment."¹ The court ruled that since Phillips Lumber Company had entered into no prime contract, Metts was not a subcontractor under section 6998-04 of the Code, but was an independent contractor, thus absolving the lumber company of liability. *Rodgers v. Phillips Lumber Co.*, 130 So. 2d 856 (Miss. 1961).

Thirty-nine states have adopted statutes imposing compensation liability on the general employer for injuries to employees of contractors

⁸*Vitarelli v. Brunson Constr. Corp.*, 235 App. Div. 804, 256 N.Y. Supp. 637 (1932).

⁹See *Saso v. State of New York*, 20 Misc.2d 826, 194 N.Y.S.2d 789 (1959).

¹⁰See, e.g., *Kuhl v. Hayes*, 212 F.2d 37 (10th Cir. 1954).

¹¹GRIFFITH, *MISSISSIPPI CHANCERY PRACTICE* § 505 (2d ed. 1950).

¹²See, e.g., *Noble v. Terrell*, 64 Miss. 830, 2 So. 14 (1887).

¹³GRIFFITH, *MISSISSIPPI CHANCERY PRACTICE* § 564 (2d ed. 1950).

¹MISS. CODE ANN. § 6998-04 (1956).

under him.² The purpose of these "contractor-under" clauses has been succinctly stated as being "to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the . . . principal contractor . . . who has it within his power, in choosing subcontractors, [*sic*] to pass upon their responsibility and insist upon . . . appropriate protection for their workers. The statute also aims to forestall evasion of the act by those who . . . subdivide their regular operations among sub-contractors, thus escaping direct employment relations with the workers, and relegating them for compensation protection to small contractors who fail to carry compensation insurance."³ The courts have consistently recognized these two aims to be the purpose of this type legislation;⁴ however, some state legislatures, either intentionally or unknowingly, have adopted language in their "contract-under" clauses which makes it difficult, if not impossible, in some cases for the courts to apply the statutes in such a way that their theoretical purpose will be realized. These states have limited compensation liability in the "contract-under" cases only to those general contractors who have entered into a primary contract and then subcontracted a portion of the primary contract to a subcontractor.⁵ The use of this statutory language has sometimes led the courts to use strained reasoning in attempts to find primary contracts among general employers. An oil company which contracted with automobile service stations to supply their complete retail gasoline output was held to be the primary contractor of a bulk distributor, since the bulk distributor performed work to fulfill the oil company's contractual obligations to the retail distributors.⁶ Builders have been held to be general contractors even though they owned the property prior to selling the completed house to the first occupants.⁷ Some courts, however, when faced with statutes limiting liability to primary contractors, have more closely adhered to the general concepts of primary contractors and subcontractors.⁸ Consequently, a class of employees in these jurisdictions is left uncovered, even though the spirit of the clauses was meant to protect them.⁹ The courts have had no difficulty in carrying out the spirit of the statutes in those jurisdictions which have used language imposing liability on all employers who let out on contract work which is an integral part of their business and which, in that business, is usually accomplished by employees, *i.e.*, "any work which is part of his trade, business, or occupation."¹⁰

In states which have required liability to revolve around the existence of a primary contract, entrepreneurs who have let out part of their work to contractors are not liable for compensation for injuries to the employees of the contractors since they are parties to no prime contracts. Thus, where a building contractor who contracts to build houses

²1 LARSEN, WORKMEN'S COMPENSATION LAW § 49:11 (1952).

³*Ibid.*

⁴See, e.g., *Mills v. Barnett*, 213 Miss. 171, 56 So. 2d 485 (1952).

⁵See, e.g., ARK. STAT. ANN. § 81-1306 (1960).

⁶*Huffstetler v. Lion Oil Co.*, 110 F. Supp. 222 (1953).

⁷E.g., *Clendening v. London Assur. Co.*, 206 Tenn. 601, 336 S.W.2d 535 (1960).

⁸E.g., *Evans v. Tabor Lumber Co.*, 232 N.C. 111, 59 S.E.2d 612 (1950).

⁹See *Mills v. Barnett*, 213 Miss. 171, 56 So. 2d 485 (1952); 1 LARSEN, WORKMEN'S COMPENSATION LAW § 49:11 (1952).

¹⁰VIRGINIA CODE, tit. 65, § 26 (1950).

for owners of a subdivision would be liable for injuries to employees of contractors under him,¹¹ but the same building contractor, if he owned the property and was developing the subdivision himself, would not be liable for injuries to employees of contractors under him.¹² Similarly, a sawmill, owning timber lands and usually performing its own logging operations with its own employees, is not liable for injuries to employees of independent loggers with whom it contracts to perform the logging operations.¹³ Thus, in these states, even if the work of the employer contracted out is part of his regular business and trade, he is relieved of all liability in the performance of the work when he uses independent contractors, many of whom may be small enough not to come under the statutory requirements of the respective acts¹⁴ and have no coverage for their employees.

Assuming that the purpose of the various state legislatures in enacting the "contract-under" clauses is the same as the courts¹⁵ and other authorities¹⁶ deem it to be, that purpose can fully and adequately be carried out by the courts only when the statutory language makes the test of liability to be either that work which is subcontracted or that work which the primary employer, or employers in similar businesses, ordinarily accomplishes through employees.

Neal B. Biggers, Jr.

¹¹*E.g.*, *Jackson v. Fly*, 215 Miss. 303, 60 So. 2d 782 (1952).

¹²*See Dewhrest v. Simon*, 295 N.Y. 352, 67 N.E.2d 578 (1946).

¹³*See Bardwell's Estate v. Perry Timber Co.*, 222 Miss. 854, 77 So. 2d 708 (1955).

¹⁴*See, e.g.*, Miss. CODE ANN. § 6998-03 (1956).

¹⁵*E.g.*, *Mills v. Barnett*, 213 Miss. 171, 56 So. 2d 485 (1952).

¹⁶*LARSEN, supra* note 2, § 49:11.

RECENT BOOKS

SELECTED PROBLEMS IN THE LAW OF CORPORATE PRACTICE

Edited by Thomas G. Roady, Jr. and William R. Andersen. Nashville, Tennessee: Vanderbilt University Press. 1960. Pp. 424. \$10.00.

In the preface to this work, its editors state, "Obviously, it would be impossible in one small volume to cover extensively the whole gamut of legal problems involving the corporations of today, but it is possible to present an intensive analysis of a few selected problems of greatest current significance. And this is what we have tried to do in this book." Whether, for the Mississippi lawyer engaged in corporate practice, the problems discussed are of "greatest current significance" is questionable; yet, undeniably, this work is an important contribution to the increasing literature in the corporation law field.

To the attorney who insists that corporate practice is primarily tax practice, *Selected Problems in the Law of Corporate Practice*, by its very content, lends support. Of the chapters in this book dealing with particular problems encountered by the corporate practitioner, fully two-thirds of them deal almost solely with tax considerations. Two of the chapters are devoted to Subchapter S corporations and three chapters cover stock options and other executive incentive arrangements. One of the outstanding tax articles is "State Taxation of Income from a Multi-state Business," an exhaustive study which includes, for easy reference, tables showing, by states, the current type of tax, rates, revenue yield, methods of assigning income and applicable statutory provisions. Non-tax subjects include "Initial Capitalization and Financing of Corporations," "The Corporate Guaranty," "Extent of the Legislature's Reserve Power to Change Common Law Attributes of Corporations," and "Corporate Law Department Communications—Privilege and Discovery."

This book was edited by two members of the faculty of Vanderbilt University School of Law, and was published by Vanderbilt University Press. The fourteen articles contained in it were written by persons obviously well versed in the subjects covered. The article on financing of corporations is by Chester Rohrllich, and is adapted from a chapter in his *Organizing Corporate and Other Business Enterprises*. There are two articles by Internal Revenue Commissioner Mortimer M. Caplin, written while he was on the faculty of the University of Virginia School of Law. Paul J. Hartman, Boris I. Bittker, and Walter W. Brudno have made significant contributions. Of no small value is a study by Professor F. Hodge O'Neal and his associates of the current literature available in the field of corporate practice. Any corporate practitioner should be able to find at least one treatise, manual, service, symposium, or textbook listed in this study which he should have in his permanent library.

As a Mississippi lawyer engaged solely in corporate practice, this reviewer must admit that he would consider only a small percentage of the articles in this book as representing "selected problems of greatest

current significance" in his practice. However, the well-rounded corporate practitioner would want to have an acquaintance with most of the problems discussed in this book, whether he continually encounters them or not. For the attorney who is regularly exposed to problems in the law of corporations, this outstanding work is recommended.

Harry C. Griffith
Executive Legal Assistant
Mississippi Chemical Corporation
Yazoo City, Mississippi

EVERY MISSISSIPPI LAWYER'S LIBRARY SHOULD CONTAIN THE FOLLOWING . . .

MISSISSIPPI CODE 1942 Annotated, Recompiled Ed., 15 Volumes, including Current Pocket Parts	\$144.00
1960 Pocket Parts separately	27.50
BUNKLEY and MORSE'S AMIS DIVORCE and SEPARA- TION in Mississippi with Forms, 1 Volume	20.00
DUNN, MISSISSIPPI WORKMEN'S COMPENSATION LAW and PRACTICE with Current Pocket Part Supp... .	20.00
1960 Cumulative Pocket Supplement (separately)	8.00
GRIFFITH, MISSISSIPPI CHANCERY PRACTICE, Revised Edition, 1950	20.00
GRIFFITH, OUTLINES OF THE LAW Mississippi Edition, 1949	10.00
McELROY, MISSISSIPPI EVIDENCE, 1955	20.00
MORSE, MISSISSIPPI LEGAL FORMS ANNOTATED, 2 Vols., including Current Pocket Parts	45.00
1961 Pocket Parts separately	15.00
WINGO, MISSISSIPPI CRIMINAL LAW and PROCEDURE, 1951	20.00

Descriptive folders mailed upon request.

(LIBERAL TERMS EXTENDED)

THE HARRISON COMPANY

LAW BOOK PUBLISHERS

93 Hunter Street S. W., P. O. Box 4214 Atlanta 2, Georgia

MISSISSIPPI REPRESENTATIVE

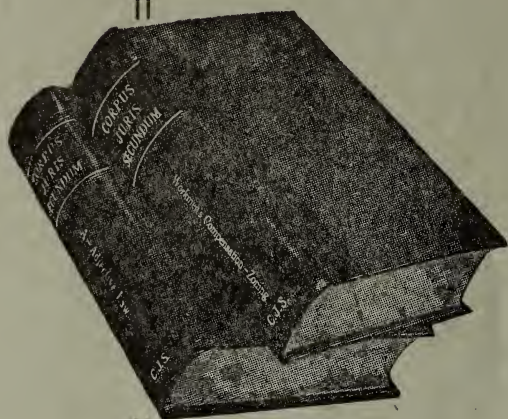
Morton Hawkins

531 Wright Mill Road

Auburn, Alabama

Please mention the *Mississippi Law Journal* when dealing with our Advertisers

The Lawyer's "Blue Chip" Investment



This is one investment which keeps an unbroken record of dividend payments year after year.

Dividends of time and money which make Corpus Juris Secundum a sound invest-

ment for every lawyer.

Your *Corpus Juris Secundum* investment guarantees an answer which is *the law*, because *the Corpus Juris Secundum answer is based on all the decisions which have made it law.*

WEST PUBLISHING COMPANY
St. Paul 2, Minnesota